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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No. 783

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,
Debtor,

* * * * *

CITY OF HAMMOND, INDIANA, a Municipal Corporation, and [redacted],
Petitioners,

vs.

WALTER A. McLEAN, TRUSTEE, and HERSCHEL B. DAVIS,
Respondents.

} In Proceedings for the Reorganization of a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Opinions Of The Court Of Appeals And The District Court Are Appended.)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Opinions Of The Court Of Appeals And The District Court Are Appended.)

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

On January 13, 1941, a creditors' petition under Chapter X of the Bankruptcy Act (the Chandler Act) was filed for and on behalf of Clarence A. Wefel and Orville R. Maxfield, co-partners, d/b/a Wefel and Maxfield, Dela-

van D. Bowsher and Augustus M. Neumann. The petitioners alleged that they were the holders and owners of a substantial number of defaulted City of Hammond Special Improvement Bonds and Coupons issued under the Barrett Law. It is alleged further that:

> "12. Forty-five (45) proceedings to foreclose and enforce the lien of various special assessments against the great portion of the property of the debtor are now pending, as set forth in said Schedule 'D' hereto attached, made a part hereof, and verified by the oath of your petitioners."

An order was entered on January 21, 1941, approving the petition as properly filed under Chapter X of the Bankruptcy Act and appointing Charles L. Surprise as Trustee. Surprise was ordered to file a statement of the assets and liabilities of the Woodmar Realty Company and to propose a plan of reorganization. An order was entered on January 24, 1941, classifying "claims of holders of special assessment bonds of the City of Hammond, Indiana, issued under and pursuant to the Barrett Law of the State of Indiana, as Class 2 claims".

On March 20, 1941, Charles L. Surprise, Trustee, filed his report concerning the financial condition of the debtor. The Woodmar Realty Company had notes available in the amount of $50,161,41, moneys due on land sales contracts in the amount of $44,501.54, and improved real estate appraised at $2,341,970.00.

An Amended Plan of Reorganization of the Woodmar Realty Company was filed and approved on July 3, 1941, requisite consents were obtained by October 23, 1941, and an order entered by the District Court on November 22, 1941, confirming the plan of reorganization as amended.

In the next ten (10) succeeding years, the Woodmar Realty Company's real estate was liquidated for total receipts of $708,982.14. Fees, commissions and expenses paid totaled $216,993.58.

Following prolonged hearings, and by order entered on December 3, 1952, the "proposed amendments to the amended plan and the method of distribution therein suggested" were determined to be not feasible, fiduciary fee claims totaling $287,380.41 denied with minor exceptions, and the Trustee, Charles L. Surprise, removed.

On February 16, 1953, the Court entered an order that the debtor should be adjudged bankrupt and that bankruptcy of the Debtor should be proceeded with in accordance with Section 236 (2) of the Acts of Congress relating to bankruptcy.

Notwithstanding the decision of the District Court entered on December 3, 1952, the successor trustee, respondent Walter A. McLean, represented by Herschel B. Davis respondent, the attorney for the former trustee, Charles L. Surprise, undertook to project a novel and unprecedented method of distributing the trust assets to the alleged holders of City of Hammond Special Improvement Bonds and Coupons. The next ensuing thirteen (13) years were devoted to this new method of procedure. On September 7, 1955, respondent trustee Walter A. McLean reported that an auditor, McCall, had audited the City of Hammond's records and had worked out a formula for distributing the cash assets of the estate.

The "audit" had been performed in the City Hall without the knowledge, consent, or authorization of the financial officers of the City of Hammond.

Twelve (12) years have elapsed since the distribution scheme was filed. The proceedings in the District Court, after September 7, 1955, have been devoted to a series of legal maneuvers designed to eliminate opposition to the distribution scheme. It, "Trustee's Final Report," was finally noticed for hearing, in amended and supplemental form, on October 22, 1965. At this hearing, no evidence was permitted either in support of, or in opposition to, the distribution scheme.

Thereafter, the District Court, on February 10, 1966, denied the objections filed by the City of Hammond to the Trustee's Supplemental Final Report, objections to the petition of Walter A. McLean, as Trustee, for an allowance of fees and expenses, and objections to the petition of Herschel B. Davis, attorney for the Trustee, for fees and expenses. By the same order, the District Court approved the Trustee's Supplemental Final Report and allowed Trustee, Walter A. McLean, the sum of $5,205.75 as fees and $729.96 reimbursement for expenses incurred, and Herschel B. Davis, Trustee's attorney, the sum of $120,000.00 as fees and $3,300.96 reimbursement for alleged expenses paid. The Trustee was ordered to proceed to make "allocations" to special assessment bonds and coupons listed and described in Exhibits "A", "B" and "C" attached to the Trustee's Supplemental Final Report. (Appellants' Appendix in Nos. 15694 & 15695, pp. 6-13, incl.) The City of Hammond prosecuted its appeal to the Court of Appeals for the Seventh Circuit which affirmed on June 22, 1967.

OPINIONS BELOW.

The Court of Appeals rendered a cursory opinion set out as Appendix "A", page 1a, infra. (We have been unable to find evidence that it has been published, either officially or unofficially.)

The order of the District Court appealed from is appended as Appendix "B", page 9a, infra, and the District Court's opinion is appended as Appendix "C", page 15a, infra.

GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS INVOKED.

The judgment sought to be reviewed is dated June 22, 1967, and was entered on the same day. Within 90 days therefrom, and upon petition filed under Rule 22, the time for filing the Petition for Certiorari was extended.

The order of this Honorable Court extending the time for filing the Petition for Certiorari was entered on September 22, 1967, and the time was extended through and including November 4, 1967.

This Court's general jurisdiction to review judgments of the Courts of Appeals in reorganization and bankruptcy cases is involved.

Specifically, the Court's jurisdiction is based upon 11 U.S.C. (Bankruptcy), § 47 (C), and 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether or not the Court of Appeals erred in approving the trustee's supplemental final report and in failing to require the lien claimants to prove their claims by the presentation of evidence at a proper hearing.

(2) Whether or not the Court of Appeals erred in failing to follow the requirements of Rule 52 of the Federal Rules of Civil Procedure.

(3) Whether or not the Court of Appeals erred in denying the City of Hammond's objections to the trustee's supplemental final report, etc., in approving the same, and in ordering payment of recommended "allocations" in favor of some 300 lien claimants, without pleading or proof.

(4) Whether or not the Court of Appeals erred in approving the trustee's supplemental final report as well as the trustee's fee petition and the trustee's counsel's fee petition at the hearing on October 22, 1965, since the City of Hammond, a creditor, did not receive notice of the hearing as required by law.

(5) Whether or not the Court of Appeals erred in approving the fee petitions of the trustee and his counsel where the fee petitions failed to specify, in the detail required by law, the work allegedly performed by said fiduciaries.

(6) Whether or not the Court of Appeals erred in granting the fee petitions of the trustee and his counsel, where under the undisputed evidence in the record, many of the activities for which fees are sought were performed not for the benefit of the estate but for special interests adverse to the estate.

APPLICABLE STATUTES AND COURT RULES.

Rule 52 (a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "Rule 52. Findings by the Court
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948." (28 U.S.C.A., Rule 52 (a), p. 14)

Burns' Indiana Statutes Annotated, § 2-620, provides as follows:

> "No action shall be brought for the foreclosure of the lien of any assessment for streets, sewers, sidewalks, ditches and other public improvements, which is not commenced within five (5) years from the time the right of action accrues: provided, however, that

where any such assessment shall be payable in installments, such action may be brought at any time within fifteen (15) years from the date of the final approval of such assessment as shown by the record creating and evidencing such lien."

Burns' Indiana Statutes, 1963 Replacement, Vol. 9, Part 1, § 48-2721, at p. 346, provides as follows:

"If the property shall sell for more than enough to pay the principal, interest, attorney's fees, costs and expenses, the surplus shall be paid to the property owner or party lawfully and rightfully entitled thereto."

Section 66 of the Bankruptcy Act, 11 U.S.C.A., § 106, provides in pertinent part as follows:

"§ 106. Unclaimed moneys

a. Dividends or other moneys which remain unclaimed for sixty days after the final dividend has been declared and distributed shall be paid by the trustee into the court of bankruptcy; and at the same time the trustee shall file with the clerk a list of the names and post-office addresses, as far as known, of the persons entitled thereto, showing the respective amounts payable to them.

b. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided,* That, in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends. July 1, 1898, c. 541, § 66, 30 Stat. 564; June 22, 1938, c. 575, § 1, 52 Stat. 875."

CONCISE STATEMENT OF THE CASE.

A.

LITIGATION AFFECTING THE CITY OF HAMMOND ON BARRETT BONDS.

The 300 lien claims which the Trustee was ordered to pay are predicated upon alleged ownership and possession of long defaulted City of Hammond Special Improvement Bonds. These special improvement bonds were issued pursuant to resolutions of the Board of Public Works and Safety in the 1920s under the Barrett Law. (Burns' Indiana Statutes Annotated, § 48-2711 and §48-2721 and § 48-4401 through § 48-4432, incl.) Liens were spread in the 1920s upon the real estate benefited by the special improvements through resolutions of the Board of Public Works and Safety. The improvement bonds and coupons were discounted and widely distributed by the contractors. By 1932, all of the bonds and coupons had gone into default because of the fact that the owners of the improved real estate were unable to pay their assessments due to the depression.

By the end of the 1930s, many of the improvement bonds and coupons had fallen into the hands of speculators. The Record in these proceedings discloses that many of them could be and were purchased for a few cents on the dollar.

By January 13, 1941, forty-nine (49) statutory foreclosure suits had been filed in the Lake Superior Courts, Rooms 1, 2 and 5, and in the Lake Circuit Court, on improvement resolutions affecting the real estate of the Woodmar Realty Company in Hammond. (See Schedule

"D", court proceedings involving properties of the Woodmar Realty Company, creditors' petition filed on January 13, 1941.) **The City of Hammond was a defendant in each case.** The forty-nine (49) foreclosure suits were, of necessity, class actions because of the following pertinent provisions of Burns' Indiana Statutes, § 48-2721:

> "Provided, that the first bondholder who institutes foreclosure suit in any court of competent jurisdiction against such property or any lot or parcel thereof shall be entitled to have the proceeds of said suit applied pro rata to the payment of his own bonds and of bonds held by others."
>
> • • • • •
>
> "No more than one (1) foreclosure suit shall be brought against any one (1) lot or parcel of land, but all lots or parcels of land, the assessments against which are in default, may be joined in one (1) proceeding."

The forty-nine (49) lawsuits against Woodmar and the City of Hammond were controlled by relatively few Hammond attorneys, to-wit: Hugh E. Carroll, (Lake Superior Court, Cause No. 51115); Donald C. Gardner, (31 foreclosures); Floyd R. Murray, (6 foreclosures); Bernard A. Petrie, (Cause Nos. 50885 and 51455); C. Ballard Harrison, (Cause Nos. 52503, 52505 and 52969); Jesse McAtee, (Cause No. 11917); Rae M. Royce, (Cause No. 52883); Milo Bruce, (Lake Circuit Court, Cause No. 27490); and Frederick Lisius, (Cause Nos. 51636, 51688 and 51790.)

Shortly after the reorganization proceedings were instituted, C. Ballard Harrison, Floyd R. Murray, and Frederick G. Lisius, became members of a "Bondholders' Protective Committee". Donald C. Gardner and Rae M. Royce acted as attorneys for the committee. Harrison, Murray,

Lisius, Gardner and Royce sought an allowance of fees out of the Woodmar assets in 1951. They controlled, and represented on a "class" theory, City of Hammond improvement bond and coupon holders under 41 of the 49 resolutions affecting Woodmar real estate.

During the 1940's, while these proceedings were pending, C. Ballard Harrison, Donald C. Gardner, Frederick G. Lisius, Rae M. Royce, Trustee Charles L. Surprise, (himself an attorney), and the Trustee's attorney, Carl A. Huebner, **filed and prosecuted numerous so-called "city liability" cases on the same defaulted City of Hammond special improvement bonds.**

These suits were instituted in an effort to exploit a Supreme Court of Indiana decision in the case of *Read* v. *Besczkiewicz* (1939), 215 Ind. 365; 18 N.E. 2d 789; 19 N.E. 2d 463, wherein it was decided that the county treasurer, acting as ex-officio City Treasurer in Barrett Law assessment collections, was obliged to segregate annual installments collected for the benefit of improvement bonds maturing during the year of collection—a new theory in Barrett Law collection and retirement of improvement bond practices. (See *Gilkison, et al* v. *Darlington* (1952), 123 Ind. App. 28; 106 N.E. 2d 473.)

Lake Assessment Bond Service, formed and owned by Trustee, Charles L. Surprise, Trustee's attorney, Carl A. Huebner, and accountant and lien claimant, Clifford Etling, as a vehicle to solicit defaulted City of Hammond Special Improvement Bonds, instituted a so-called "test case" in the name of Herbert Melville, under contract with Lake Assessment, to establish a legal predicate for "city liability" on the part of the City of Hammond under the theory of *Read* v. *Besczkiewicz,* supra. *City of Ham-*

mond v. *Melville* (1944), 114 Ind. App. 602; 52 N.E. 2d 845. Thereafter, Lake Assessment prosecuted a second "test case" on behalf of a Class 2 lien claimant and contract client, Matthew W. Welsh to establish a ten (10) year limitation on suits against the City of Hammond on defaulted special improvement bonds. *City of Hammond* v. *Welsh* (1946), 224 Ind. 349; 67 N.E. 2d 390.

In order to avoid any problem of adjudication in favor of the City of Hammond, Trustee, Surprise, Trustee's attorney, Huebner, and the members of the Bondholders' Protective Committee wrote into the Amended Plan of Reorganization, approved on July 3, 1941, the following significant provision:

> "(C-1) That nothing herein contained shall affect, in any way, the rights and claims of special assessment bondholders who are creditors within Class 2 with respect to any claims or rights which they may now have against the City of Hammond, Indiana, a municipal corporation, upon their respective bonds and coupons, **it being intended hereby to expressly reserve to said creditors within Class 2 as special assessment bondholders, all rights and claims which they may now have against the City of Hammond, Indiana, a municipal corporation.**" (Our emphasis) (Transcript of Record in No. 11783, p. 30)

After procuring the legal predicates in the "test cases", supra, which were undefended both below and on appeal by the then city attorneys, and in the fall of 1946 and early 1947, Trustee, Charles L. Surprise, Trustee's attorney, Carl A. Huebner, bondholders' attorneys, Royce and Gardner, and committee members, Harrison and Lisius, caused one hundred twenty-four (124) judgments totaling $958,000.00 to be entered against the City of Hammond without evidence, proof, or defense by the

then city attorneys. These judgments were subsequently declared void for fraud on the court and on the City of Hammond in two (2) taxpayers' suits tried in the Porter Circuit Court under Cause Nos. 13754 and 13755. On appeal, the Findings of Fact were affirmed and a reversal entered on certain Conclusions of Law. *Gilkison, et al* v. *Darlington* (1952), 123 Ind. App. 28; 106 N.E. 2d 473.

Twenty-four (24) of the one hundred twenty-four (124) judgments, totaling $102,000.00 out of the $958,000.00, were entered under Cause No. 51815 in the Lake Superior Court, Room No. 5, on defaulted City of Hammond Special Improvement Bonds and Coupons allegedly representative of lien rights against the Woodmar Realty Company's real estate. Many of the same bonds and coupons referred to in the Trustee's Supplemental Final Report for beneficial "allocations" were the same bonds upon which attorneys for the Bondholders' Committee took "city liability" judgments in the late fall of 1946 and early spring of 1947.

Much of the documentary evidence introduced in the trial of the taxpayers' suits in the Porter Circuit Court and substantial excerpts of the testimony of the fiduciaries and "lien claimants" was offered and received in evidence by the District Court during the hearings on the fee petitions and the Alternative Plan of Distribution submitted on April 16, 1951.

The $958,000.00 worth of fraudulent judgments against the City of Hammond were, allegedly, based upon an audit of the City of Hammond's special assessment records by a man named Krueger. The so-called "Krueger audit" was never produced during the lengthy trial of the taxpayers' cases in the Porter Circuit Court. The "Krueger

audit" is similar, if not identical, with the "McCall audit" which is the predicate of Trustee McLean's proposed "allocations" in that it did not take into account any of the collections obtained through settlements or dismissals in the forty-nine (49) foreclosure suits prosecuted against the City of Hammond, the Woodmar Realty Company, and others, as hereinabove mentioned, for the express purpose of retiring special improvement bonds and coupons.

On November 29, 1950, Respondent, Herschel B. Davis, spent a day in Crown Point, along with the then co-attorney for Trustee, Charles L. Surprise, Arnold G. Huebner, discussing with the County Treasurer a proposal to pay all of the cash assets of the Woodmar estate, after the allowance of fiduciaries fees, into the Treasurer's Office in the City of Hammond for distribution. (Herschel B. Davis fee petition filed on March 23, 1951, Bill of Particulars, p. 5.) On March 2, 1951, Respondent, Herschel B. Davis, spent one-half (½) day in studying: "in re plan for complete liquidation of Woodmar and payment of such funds to Lake County Treasurer; further review of Barrett Law bond cases; telephone conference with Arnold Huebner." (Davis petition, supra, p. 6.) On February 21st and 22nd, 1951, following conferences with Respondent, Herschel B. Davis, co-attorney, Arnold G. Huebner, prepared a "tentative form of claim of Treasurer of Hammond, Indiana, for balance of proceeds of trust belonging to special assessment lien holders and bondholders." (Huebner fee petition, p. 74.) The denial by the District Court on December 3, 1952, of the "Alternative Plan of Distribution", filed by Respondent, Herschel B. Davis, did not clear the City of Hammond and its taxpayers from attack.

Notwithstanding his "temporary withdrawal" as Trustee's attorney on May 19, 1950, and his subsequent disbarment on April 29, 1954, Carl A. Huebner continued to practice law in his offices in the Calumet Building along with his brother, Arnold G. Huebner, and his son, Paul B. Huebner.

In December of 1958, the Appellate Court of Indiana issued another opinion in connection with the Porter Circuit Court Barrett Bond litigation, (154 N.E. 2d 402), which was set aside by the Supreme Court of Indiana on transfer on December 7, 1959. *City of Hammond v. Darlington, et al* (1959), (rehearing denied 1961), 241 Ind. 536; 162 N.E. 2d 619, 173 N.E. 2d 662. Interpreting these opinions as grounds for a wholesale reinstatement of the "city liability" cases, certain of the Woodmar lien claimants, or Class 2 claimants, involved as so-called "class plaintiffs" in twenty-four (24) of the forty-nine (49) lien foreclosures, hereinabove referred to, acting by and through the Huebner law offices, undertook to prosecute the ninety-eight (98) "city liability" cases involved in the Porter Circuit Court litigation together with an additional fifty (50) cases which had been pending on the dockets of the Lake Superior Courts since 1941 and in which no "agreed" judgments against the City of Hammond had been procured in 1946 or 1947.

In 1960, the City of Hammond successfully defended itself against all of these cases. Woodmar lien claimant, Richard F. Zilky, (the beneficiary of proposed "allocations"), prosecuted an original action in mandamus against the Lake Superior Court, Room #1, as a so-called "test case". *State, ex rel Zilky* v. *Lake Superior Court* (1961), 242 Ind. 128; 175 N.E. 2d 9. Another Wood-

mar lien claimant, (and contract client of Lake Assessment Bond Service), American Fletcher, etc., as Trustee of the William Bartlett Estate, prosecuted a similar "test case" against the Lake Superior Court, Room #5. *State, ex rel American Fletcher, etc.* v. *Lake Superior Court, Rm. #5* (1961), 242 Ind. 118; 175 N.E. 2d 3. Zilky's Petition for a Writ of Certiorari to the Supreme Court of the United States was denied on December 4, 1961. *Richard Zilky, et al, petitioner,* v. *Lake Superior Court, Room #1, et al* (1961), 368 U.S. 928; 82 S. Ct. 364.

Notwithstanding the decisions in the "test cases", supra, the Huebners undertook to prosecute a further "test case" in the name of Lake Assessment Bond Service client, Frank DeLau. They lost this case both below and on appeal. *DeLau, et al* v. *City of Hammond* (1963), 134 Ind. App. 191; 186 N.E. 2d 900. A further effort to block the winding up of the Porter Circuit Court Barrett Bond litigation against the City resulted in extensive contempt proceedings. *State, ex rel Huebner* v. *Porter Circuit Court, et al* (1962), 243 Ind. 321; 185 N.E. 2d 299 and *State, ex rel Huebner* v. *Burns, Judge* (1962), 243 Ind. 524; 186 N.E. 2d 424.

On March 13, 1962, the firm of Huebner and Huebner filed an omnibus case against the City of Hammond entitled *Registration & Management Corp., et al* v. *City of Hammond,* Lake Superior Court, Room #1, Cause No. 162-46.

The following Woodmar Realty Company Class 2, or "lien claimants", are named as parties plaintiff: Registration & Management Corp., listed by Respondent Walter A. McLean, Trustee, as Claim #29, "Realty Assets Corporation", allocation $7,301.34. (Appellants' Appendix in

No. 15694 & 15695, Trustee's Supplemental Final Report, p. 358); American Fletcher National Bank, etc., listed as Claim #30, American Fletcher National Bank, etc., allocation $2,461.07; Sarah Gilkison Carter and Jane Gilkison Curtis, listed as Claim Nos. 443, allocation $4,091.37, (Appellants' Appendix, supra, p. 364), Claim #506, allocation $2,909.19, (Appellants' Appendix, supra, p. 367), and Claim #36, allocation $605.86, (Appellants' Appendix, supra, p. 369); Richard F. Zilky, listed as the owner of Claim Nos. 365 through 380, incl., for a total allocation of $4,667.74, (Appellants' Appendix, supra, p. 368); Darwin F. Luscher, listed as Claim #62, for an allocation of $1,955.78, (Appellants' Appendix, supra, p. 359; and John G. Phrommer, listed as Claim #432, allocation $538.56, Claim #433, allocation $5,285.35, (Appellants' Appendix, supra, p. 364), and Claim #540, allocation $42.12, (Appellants' Appendix, supra, p. 367). The City of Hammond filed Answer and Cross-Complaint seeking an injunction against the named plaintiffs and the Huebners to enjoin them from the institution and prosecution of further suits on the long outlawed, defaulted City of Hammond Special Improvement Bonds issued in the 1920s. An extensive trial was had. **The cause is awaiting decision.**

The proposed "allocation" project of Respondents, Walter A. McLean and Herschel B. Davis, is fraught with danger to the City of Hammond and its taxpayers.

B.

THE FEE PETITIONS OF APPELLEES WALTER A. MCLEAN AND HERSCHEL B. DAVIS.

(1)

Factual Background.

Woodmar's real estate, valued by Trustee Charles L. Surprise on March 20, 1941, at $2,341,970.00 was liquidated by Trustee Charles L. Surprise for gross receipts of $708,982.14 of which $216,993.58 was allowed and paid as fees, commissions, and expenses prior to April 16, 1951. (Record in 11783, p. 124). Following the fee hearing, additional fees and expenses, including $4000 to Respondent Herschel B. Davis were paid in the amount of $10,990.45. Since Respondent's appointment on May 23, 1953, an additional sum of $29,332.94 has been spent. Since the District Court in 1963, sua sponte, ordered the fund to be deposited in interest bearing accounts, $34,712.51 additional income has been received (including reimbursement for bond premium and reverter fees). By way of recapitulation, the income and disbursements (including fees allowed) are as follows:

Total receipts		$743,694.65
Fees, commissions and expenses prior to McLean's appointment	227,974.03	
McLean's disbursements	29,332.94	
McLean's allowance as per order of Feb. 10, 1966	5,935.71	
Davis' allowance as per order of Feb. 10, 1966	123,300.96	
Total		386,543.64
Net cash assets presently available for parties in interest if allowances stand		$357,151.01

It should be borne in mind that the allowances to Respondents Davis and McLean are interim—they contemplate further "work" in finding out who has the bonds, etc., as the disbursing agents.

Also, the record shows that on April 16, 1951, fee claims totalling $287,380.41 were filed by fiduciaries, including Respondent Herschel B. Davis. (Supp. Rec. in 11783, page 20). Woodmar's objections, following extensive hearings, were sustained in major part and a total of only $11,200 allowed. But certain fiduciaries were ordered to reimburse the estate for previous "interim" allowances in the amount of $6100.00. The net fees paid were $5100.00 of which $4000 went to Davis, who on behalf of the trustee, did not oppose a single fee claim (Rec. in 11783, pps. 194-197).

If the fiduciary fee claims had been allowed as prayed for in 1951 the net assets on hand, at present, would be substantially less than $50,000.00, a small return to the parties in interest for liquidating real estate valued by the Trustee at $2,341,900.

(2)

Nature of the Alleged Work Done for Which Compensation Is Sought from the Trust Estate.

The petition of Respondent Herschel B. Davis, filed on May 13, 1965, (App. 15694 & 15695, pp. 104-304, incl.), characteristically devotes the first eleven (11) pages (App. pp. 104 to 114) to a slanted, inaccurate and incomplete history of the first fourteen (14) years that the proceedings were pending after his entry into the same. By way of window dressing, he describes the process of "checking and investigation of claims", a chore which at

least five (5) fiduciaries, including Carl A. Huebner, Charles L. Surprise and Assistant Secretary of Lake Assessment, Arnold G. Huebner, previously claimed credit for over a nine (9) year period before employment of Respondents. What Mr. Davis does not mention is that the increase of two hundred-two (202) so-called Class 2 claims, which occurred over twelve (12) years after the proceedings were commenced, was the direct result of advice from Respondent Davis to alleged representatives of bondholders to "re-file" previously filed claims. The "auditing study" performed by Leonard McCall at a cost to the estate of $17,474.13, (Rec. in 11783, p. 218), was a duplicate of the Arnold G. Huebner "auditing study" previously done, and was supervised, not by Respondents Davis and McLean, but by former bondholder committeeman, Floyd R. Murray, along with attorney Leeney, who now purports to represent 70 lien claimant beneficiaries of the proposed "allocations".

The next four (4) pages are devoted to a description of the work done in connection with the first two (2) appeals, precipitated by lien claimants' attorneys, and in which Respondents were unsuccessful, (Cause Nos. 11783 and 13023). In 11783, Respondents "volunteered" to assist lien claimants' attorneys Floyd R. Murray, Edmond J. Leeney, Albert H. Gavit and Charles Levin obtain an adjudication that "Woodmar was not a party in interest" so as to eliminate opposition to the auditing study program of "allocation" and fiduciary fee petitions, the insurmountable hurdle which they had encountered on April 16, 1951.

With regard to the efforts to settle with 102 lien claimants and 3 of the 4 general creditors, despite full notice

and hearing, no objections were made by anyone, including respondents, in the District Court. The settlement stipulations would have disposed of 105 claims to the satisfaction, of record at least, of all parties to the proceedings. The settlement stipulations provided, in pertinent part:

"STIPULATION OF DISMISSAL

Comes now Ruth E. Robertson by Magnus F. Heubi, her attorney, and the Woodmar Realty Company by Owen W. Crumpacker and George V. Burbach, its attorneys and stipulate and agree as follows:

1. That Claim No. 430 has been amicably settled, compromised and adjusted. That the objections of the Woodmar Realty Company to Claim No. 430 be and hereby are withdrawn and that Claim No. 430 should be dismissed with prejudice.

2. That simultaneously with the execution of this stipulation, the claimant will execute an assignment of Bond No. 15, in each of Series 8 and 9; Hammond Special Improvement Resolution 1493 with coupons 6 through 15 attached to Bond 15 Series 8 and coupons 6 through 17 attached to Bond 15 Series 9, to the Woodmar Realty Company, subject to Court approval.

3. That upon approval of this stipulation and assignment, the Court shall enter an order directing the Trustee Walter A. McLean to issue a check on the Trustee's account in the Gary National Bank in the amount of $375.00 payable to Ruth E. Robertson, care of Magnus F. Heubi, Attorney at Law, Citizens Trust Building, Jeffersonville, Indiana.

All Of Which is stipulated to by and between the parties this 12 day of October, 1957.

Ruth E. Robertson
By: /s/ Magnus F. Heubi
Her Attorney

Woodmar Realty Company
By: /s/ Owen W. Crumpacker
/s/ George V. Burbach
Its Attorneys
5217 Hohman Avenue,
Hammond, Indiana"

Approved:

.....

Judge, United States
District Court

(Settlement Stipulation of Ruth E. Robertson)

While purporting to be "neutral" in the District Court, respondents fought approval of the 105 settlement stipulations on appeal. They admitted that approval of the settlement stipulations would result in a further surplus of $76,489.89 in the estate but contended, at p. 27 of the Respondents' Brief on Appeal, filed on August 2, 1960:

> "It then follows that the mere fact that the compromise settlements would take $76,489.89 from the lien creditors and place it in the general funds of the bankruptcy, does not of itself determine that it is for the best interests of the estate.
>
> The question then is: Is it for the best interests of the estate? Is it fair and equitable under all the relevant facts disclosed by this record that this sum of $76,489.89 be taken from the lien creditors?"

This Court answered the question "Yes", and reversed the decision of the District Court and directed the District Court to approve the settlement stipulations. (284 F. 2d 815). Some six (6) months later, and on July 21, 1961, the District Court entered an order approving the 102 settlement stipulations with lien claimants and 3 settlement stipulations with general creditors. But, respondents undertook to flout the mandate of the Court of Appeals because it might upset "the auditing study and the

allocation of cash to claims". The petition of Herschel B. Davis, alleges, at the bottom of App. p. 119:

> **"The Trustee and petitioner herein, however, advised the District Court that in their opinion the payment of such compromise settlements at that time would be premature and inadvisable until there had been a court approval of the auditing study and the allocation of cash to claims,** as set out in the Trustee's Final Report, and until it was determined that the Trustee's Final Report was not a fraudulent report, as contended by Woodmar Realty Company and its attorney."

The Davis petition then recites (App., pp. 121-124, incl.) how they successfully remained mute in the District Court and intervened on appeal to prevent eleven (11) further lien claimants, all represented by attorneys, from concluding settlements of their lien claims (without objection) and to keep thirty-three (33) patently abandoned lien claims available for "allocation".

The balance of the Davis petition, (App., pp. 124-139, incl.), is devoted to a description of work done in Claim 441 (tried by attorneys Floyd R. Murray and Edmond J. Leeney on July 15th and 16th, 1957); efforts to prevent being removed, both below and on appeal; activity in presenting the "Motion for Summary Judgment"; and their efforts in frustrating the mandate of the Court of Appeals in obtaining an order, without notice, under date of April 28, 1964, purporting to "vacate approval of the 105 settlement stipulations", supra, on the ground that there wasn't anything the Woodmar Realty Company could do about it because it was not "a party in interest" even though the Court of Appeals had previously held in February of 1957, in Cause No. 11783, that it was obviously a real and substantial party in interest. For these

activities, respondent Davis alleges that he applied "skill derived from 30 to 40 years in the active law practice" and that the reasonable value of his rendered services was $120,000.00.

Respondent Walter A. McLean, Trustee, alleges that he was more than a stakeholder in the proceedings, that he, along with Davis, studied the claims, that he was maligned as the important officer of a title company, that he consulted and advised with attorney Herschel B. Davis and went to court with him on occasion, and that he was entitled to the maximum authorized by law, $5,480.75 plus reimbursement for $729.96 out-of-pocket. (App. in 15694 & 15695, pp. 30-103, incl.)

(3)

The Record Discloses That All of Appellees' Activities, as Described in the Fee Petitions, Were Performed Not for the Benefit of the Estate But for Special Interests, Adverse to the Estate.

Since his employment on May 23, 1950, as co-attorney with Lake Assessment Assistant Secretary, Arnold G. Huebner, for Trustee Charles L. Surprise (President of Lake Assessment Bond Service, Inc.), respondent Herschel B. Davis has undertaken, at the expense of the estate, to work for special interests adverse to the estate who had lawyers of their own. These special interests are confined to the particular Class 2 lien claims which the former fiduciaries either own (Zilky, Gardner, Wefel, etc.) or have a direct financial interest in by contingent fee contract, (Lake Assessment Bond Service, Inc. and 70 Murray-Leeney claims). Respondents Davis and McLean successfully opposed the efforts of the late Hugh E. Carroll, the attorney for the holders of the largest number of City

of Hammond Special Improvement Bonds and Coupons, to obtain a court adjudication of his and his clients' lien rights, if any, in the assets. The respondents, in the second appeal, fought against the desires, intentions and advice of the attorneys who represented 102 lien claims and 3 out of the 4 general creditors of the Woodmar Realty Company. They, likewise, successfully opposed the 11 lien claimants and their counsel who made subsequent efforts to settle. (Rec. in No. 13575)

Respondents joined with attorney Albert H. Gavit (who appeared for Lake Assessment contract clients in this case and represented Carl A. Huebner in the state court proceedings); Charles Levin (who appears of record for claimants Zilky and Gardner); and bondholder committeeman, Floyd R. Murray, and his trial counsel, Edmond J. Leeney (who now purport to represent seventy (70) lien claimants), both below and on appeal, in their unsuccessful efforts to have the Woodmar Realty Company's pleadings stricken on the ground that Woodmar was not "a party in interest". The Davis fee petition discloses numerous periodic conferences with them thereafter, both in person and on the telephone, with reference to the affairs of the estate. (App. in 15694 & 15695, pp. 143, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 157, 158, 159, 160, 162, 163, 164, 167, 168, 170, 171, 172, 173, 174, 175, 176, 177, 179, 181, 182, 183, 184, 185, 186, 187, 190, 191, 192, 193, 197, 201, 228, 246, 248, 252, 253, 262, 266, 275, 277, 279, 280, 293, 294, 295 and 303.) In no instance do the listings describe what Davis conferred about or in what manner, if any, the conferences were of benefit to the estate. The estate is charged bonus rates for the "conferences". For instance, on November 26, 1962, the

estate is charged for **two (2) days,** Davis one (1) day and Gruenberg one (1) day, for "telephone conference—McLean; telephone conference—Charles Reed; Telephone conference—Floyd Murray; Telephone conference—Charles Levin. (App., pp. 265 & 266).

With reference to Claim 441, **tried by Leeney and Murray,** and in which respondents Davis and McLean had no authority to act, the estate is charged for a total of 35½ days plus 42 hours over a period of time commencing on July 10, 1957, (While Murray and Leeney were in Lafayette, Indiana) through November 21, 1962: "further work on review of record on 441 and court's decision." Yet the correspondence reveals that both Murray and Leeney are handling Claim 441 (and 69 others) on a contingent fee arrangement.

For example, on March 22, 1965, respondent Davis charged the estate for one-half (½) day's work in "two (2) telephone conferences—attorney Floyd Murray re claims", and letters to Sarah Schweitzer and Mary A. Magginis reading in pertinent part as follows:

> "After receiving your letter, I called Mr. Murray on the telephone and questioned him about this representation. He told me that on June 10, 1958, Francena Tyner executed a Power of Attorney authorizing him to represent her on this claim and that he had considerable correspondence from Attorney Baxter to this same effect. **Mr. Murray then read to me a letter which he said was written by you on March 14, 1960, asking that he continue representation on this claim. Attorney E. J. Leeney and Attorney Murray, both of Hammond, Indiana, represent about 70 claimants in this matter. They are excellent attorneys."**

A follow-up letter is written by Mildred Anderson on April 1, 1965, in the Huebner offices, allegedly on behalf of Floyd R. Murray, reading in pertinent part as follows:

> **"I do not know what my attorneys fees will be at this time in this matter. It will be a percentage of the money recovered.** We just received word that the United States Supreme Court had refused the petition of the Woodmar Realty Company, the bankrupt. This means that further progress can now be made.
>
> This claim is in the name of Francena Tyner. No disbursement can be made to her heirs until the names of such heirs have been substituted as claimants in the claim.
>
> **My fees will depend upon the amount of additional work that needs to be done. If you do not intend to sign this power of attorney, kindly advise me at once."**

On October 22, 1965, attorney Edmond J. Leeney, by way of reciprocation and although he admitted he hadn't read the Davis fee petition, recommended to the District Court as follows:

> "Mr. Leeney: Well, Your Honor, I haven't read Mr. Davis' petition, except to know that the number of days, I think, that were put in all together were about 800. I am pretty much familiar with what work he did from time to time, and I know that at one time Mr. Murray and I were carrying the burden here when a previous judge would not permit him to do anything in the case, and that from then on Mr.—when Mr. Davis—as your Honor took over, Mr. Davis was permitted to go ahead and the Trustee, and I know that all during the time it has been Mr. Crumpacker's aim to defeat all these claims.
>
> * * * * *
>
> Now, these are minimum fees fixed by the Hammond Bar Association. So that if Mr. Davis has put in 800 days and his bill is for $120,000.00, I think it is reasonable.

The Court: No one else wants to comment?
(No Response.)" (Transcript of proceedings held on October 22, 1965, pp. 111, 112, 113.)

The same Hammond Bar Schedule authorizes, as a minimum, fifty per cent (50%) of moneys "recovered" on a contingent basis. Therefore, it is reasonable to assume from the correspondence that Leeney and Murray are to receive at least fifty per cent (50%) (the minimum) of the "allocation" figures to at least seventy (70) of the proposed "allocations", not including those on the abandoned or Class "B" list, or the 123 lien claimants that have attempted to settle. Nor are Leeney and Murray to participate in the 15 "Zilky allocations" (Levin), or the lien claims formerly represented by Hugh E. Carroll, or the $87,000 in Lake Assessment bonds and coupons now represented by Gavit of record.

The Record shows further that respondent Davis has undertaken to charge the estate for 33 days and 112 hours in work done on the "Motion for Summary Judgment", commencing with 6 hours on January 7, 1960, and ending with ½ day on July 16, 1964, (App., p. 285), "Study and review of Motion for Summary Judgment and law applicable on review". Yet the "Motion for Summary Judgment" consists of four (4) numbered sentences plus approximately ten (10) pages of "review of the record", and certified copies of instruments previously furnished to respondent Davis by Woodmar's counsel.

ARGUMENT.

I.

THE ADJUDICATION IN FAVOR OF 300 LIEN CLAIMS, BASED UPON ALLEGED OWNERSHIP OF CITY OF HAMMOND SPECIAL IMPROVEMENT BONDS, IN ACCORDANCE WITH THE RECOMMENDATIONS OF THE TRUSTEE IN THE SUPPLEMENTAL FINAL REPORT, ETC., CONSTITUTES SUCH A WIDE VARIATION FROM THE PROCEDURES SET FORTH UNDER THE BANKRUPTCY ACT, JUDICIAL PRECEDENTS AND THE FEDERAL RULES OF CIVIL PROCEDURE AS TO NECESSITATE REVERSAL.

A. The Law Requires Lien Claimants To Prove Their Claims.

The lien claims are not the obligations of the Woodmar Realty Company. Nor are they the general obligations of the City of Hammond. The Special Improvement Bonds and Coupons are creatures of statute and the rights of bondholders and obligations of the City of Hammond and property owners are fixed by statute.

When the owner of a defaulted City of Hammond Special Improvement Bond seeks to recover funds in the hands of a bankruptcy trustee, his claim is not a "provable claim" under Section 57 of the Bankruptcy Act (11 USCA 93), but is a reclamation petition. In the instant case, under the Bankruptcy Act, it was and is the duty of the 300 lien claimants to prove: (a) That they are the owners and holders of defaulted City of Hammond Special Improvement Bonds; (b) That as such owners and holders they have a statutory lien upon the cash assets;

and (c) That the Trustee has identifiable cash, in determined amounts, arising through the liquidation of his lien rights.

The District Court, on July 15, 1957, held in pertinent part, as follows:

> "**So, the burden,** in other words, the claim itself, proof of claim is not sufficient where there have been objections filed. **Ownership will have to be proved in the claimants. You will have to prove, gentlemen, that there was a lien, and that these bondholders are entitled to participate under the lien, and the amount.** It is incumbent upon you to prove that they are entitled to that amount under these bonds. That is on the theory that the claimants are lienholders. Now, whether they are or not, this court is not holding at this time, but you are going to have to prove the lien under the improvement resolutions 1296 and 1399, and the orders that were entered transferring that lien or liens from the real estate to the proceeds derived from the sale thereof. **Those facts you will have to prove.**" (Transcript in No. 13579)

In so doing, the District Court was applying the law established by this Court in the case of *In re Rosenbaum Grain Corp.* (C.C.A. 7, 1940), 112 F. 2d 315, at page 318:

> "* * * Ordinarily, every claimant to the assets in the hands of the trustee of the bankrupt's estate desires priority and for that reason seeks to establish that his property was acquired under circumstances giving rise to a relationship other than that of an unsecured creditor. But another requirement is generally recognized. The non-creditor claimant has the burden of proof and must be able to trace his property into the hands of the trustee in bankruptcy. If his evidence leaves the identification in doubt, the doubt must be resolved in favor of the trustee. *Richardson v. Shaw,* 209 U.S. 365, 28 S. Ct. 512, 52 L. Ed. 834, 14 Ann.

Cases 981; *Gorman* v. *Littlefield,* 229 U.S. 19, 33 S. Ct. 690; 57 L. Ed. 1047; *Schuyler* v. *Littlefield,* 232 U.S. 707, 34 S. Ct. 466, 58 L. Ed. 806; *Duel* v. *Hollins,* 241 U.S. 523, 36 S. Ct. 615, 60 L. Ed. 1143; *In re Byrne,* 2 Cir., 32 F. 2d 189, 190."

It is also the law in all other circuits. Honorable Judge Learned Hand, speaking for the Court of Appeals in the Second Circuit in the case of *In re Byrne* (1929), 32 F. 2d 189, 190 said:

> "The appellants have quite misapprehended their rights and have proceeded throughout on the assumption that they are entitled to the same relief in bankruptcy as they would have against the bankrupt in personam. Their claim is not that, but against the res administered in the Bankruptcy Court. To get any standing, except as general creditors, they must identify the original assets, or trace them into other specific funds which came into the trustee's hands. It is not enough to show that they were converted by the bankrupt, or indeed that they may have generally enriched their estate. (Citation omitted.) The claimant has the burden of identification in such cases, and the appellants at bar have made no effort to discharge it. To the extent that the bankrupt's books acknowledge the identity they can prevail, but no further; the balance of their claim is a general credit against the trustee, and we are not here concerned with this liquidation."

Likewise, in the case of *American Service Co.* v. *Henderson, et al.,* (C.C.A. 4, 1941), 120 F. 2d 525, it is said at page 530:

> "Clearly the burden rests upon the claimant to establish the original trust relationship. He must prove his title, identify the trust fund and, where the fund has been mingled with the general property of the debtor, sufficiently trace the trust property."

(To the same effect, see *In re Tate-Jones & Co., Inc.* (W.D. Pa., 1949) 85 F. Supp. 971.)

When the Trustee's Supplemental Final Report; "Petition for Authority to Make Distribution to Claimants, etc." and the Objections of the City of Hammond (and others) thereto were submitted for trial on October 22, 1965, not a lien claimant appeared, no City of Hammond Special Improvement Bonds and Coupons were offered or received in evidence, no proof was offered establishing the existence of a lien, and no evidence was heard with reference to the amount of cash due any lien claimant. In other words, 300 lien claims were adjudicated against the assets of the estate without proof.

B. An Alleged "Auditing Study" Cannot Be A Substitute For Pleading And Proof As Required By Law.

The "auditing study" concept originated with the former trustee's attorney, Carl A. Huebner:

> "Q. Well, isn't it a fact the first one that ever came before the committee with such a suggestion, as shown by the minutes, was Carl Huebner?
>
> A. I think so. I think everyone agreed that was the best method.
>
> Q. In all of the Barrett Law matters you have had in Hammond, where there was a distribution following liquidation problem, that is, after the fees were paid, it was the Huebner program, the Carl Huebner program, to throw the residue into the Treasurer's office for distribution, wasn't it?
>
> A. Yes.
>
> Q. And that was all right with you, wasn't it, as a representative of bondholders?
>
> A. Yes." (Gardner, Volume 14, pages 2898-2899, —May 25, 1951.)

As previously pointed out in this brief, Arnold G. Huebner, law partner of Carl A. Huebner and co-counsel with respondent Herschel B. Davis for trustee Surprise, had already performed the basic audit, and by May 19, 1950, the alleged rights of the bondholders had already "been calculated and determined by the fiduciaries".

An identical audit, prepared under the direction of Carl A. Huebner, under the same circumstances, was found to be fraudulent in *Gilkison* v. *Darlington* (1952), 123 Ind. App. 28; 106 N.E. 2d 473:

> "The trial court, in its special findings of fact, found, among other things that (1) the attorneys for the judgment-plaintiffs, the attorneys for the City of Hammond, and the controller Keller H. Cochran, had agreed on the procedure to be followed, whereby they attempted to defraud the city of the sum of $958,000.00 by the taking of judgments and the payment thereof through the issuing of bonds upon the city. The court found that as a part of this conspiracy the defendant Cochran (1) participated in the meeting of August, 1946, between Huebner (whose clients held more than half the judgments), Stilley, the City Attorney, and others; **that he directed the preparation of the "Krueger audit," upon which all judgments were based, which audit was found by the court to be grossly excessive and was falsely represented to the court as having been made under the supervision of the State Board of Accounts.** That another step in the fraudulent scheme was (2) the issuance of a misleading prespectus by Cochran's office for the purpose of selling the bonds with which to pay off the several judgments. The court further found (3) that Cochran was informed by attorney Harrison of the fraudulent practices followed by attorneys Huebner and Gardner as to the judgments

taken by them and, when so informed, he told Harrison that his judgments must be made to conform to the same pattern or they would not be allowed."

The Record discloses that the "auditing study", prepared by Leonard McCall under the direction of Floyd R. Murray, was not offered or received in evidence. Nor was the auditor produced. According to the "Trustee's Supplemental Final Report, etc." the auditor undertook to usurp the functions of the District Court in matters of law as well as fact (allocations). Through an alleged examination of records in the City Hall, at undisclosed times, he determined "lien liability". Likewise, through an ex parte, out of court examination of "bond records", the auditor determined what bonds were or were not paid. The "auditing study" would be the hearsay conclusion of a witness, even if it were produced.

C. The Adjudication Declares Liens In Favor Of Outlawed City Of Hammond Special Improvement Bonds Where The Liens Have Lapsed Under The State Law.

Exhibit 97, Record in 13215, sets out the date of the adoption by the Board of Public Works of the City of Hammond of each of the fifty (50) Improvement Resolutions authorizing the issuance of the bonds and coupons involved in the 300 liens adjudicated by the order of February 10, 1966. Twenty-two (22) of the Resolutions were adopted in 1925. Seven (7) were adopted in 1926. Fifteen (15) were adopted in 1927. Six (6) were adopted in 1928. By statute, the liens remained in existence for a period of fifteen (15) years from the date of the adoption of the final Resolutions. Burns' Indiana Statutes Annotated, § 2-620, provides as follows:

"No action shall be brought for the foreclosure of the lien of any assessment for streets, sewers, side-

walks, ditches and other public improvements, which is not commenced within five (5) years from the time the right of action accrues: provided, however, that where any such assessment shall be payable in installments, such action may be brought at any time within fifteen (15) years from the date of the final approval of such assessment as shown by the record creating and evidencing such lien."

Burns' Indiana Statutes Annotated, Section 48-2722 provides in pertinent part as follows:

"Failure to pay any installment or principal or interest where (when) the same is due shall bring all installments of principal yet unpaid forthwith due and payable * * * No action shall be maintained for such foreclosure which is not commenced within five (5) years from the time the right of action accrues * * *"

Because the Barrett Law liens are creatures of statute and not of contract, the statute of limitations not only is a bar to a remedy but completely extinguishes the right and vests perfect title in the land holder. Unlike general statutes of limitations, the limitations on Barrett Law liens are statutes of extinguishment and cannot be waived or extended beyond the statutory period. The lien itself lapses by operation of law at the expiration of the statutory period of time. Such is the established case and statutory law of Indiana. *Marshall County Auditor, et al.* v. *Watkins,* 106 Ind. App. 235, 18 N.E. 2d 954. See also *Burns' Indiana Statutes,* Sec. 2-621. (Requires the county treasurer to cancel the assessment, thereby destroying the lien, by endorsement.)

The bankruptcy court is without power to extend the scope or duration of a lien created by state statute for a limited period of time. In determining the scope of

a statutory lien the bankruptcy court is bound by the law of the state creating the lien and cannot extend its operation beyond beyond that provided by statute. *In re: Hammond Interior Finish Co.*, (CCA 7, 1926) 13 F. 2d 578; *Sims* v. *Jamison*, (CCA 9, 1933) 67 F. 2d 409; *In re: New England Breeders Club*, (DCNH, 1910) 175 F. 501, p. 503; 8 C.J.S. Bankruptcy, §453.

The Record discloses, therefore, that the statutory liens had lapsed, by operation of law, prior to January 13, 1941, with reference to bonds and coupons issued pursuant to twenty-two (22) out of fifty (50) of the Resolutions. The liens had lapsed, as a matter of law, with regard to seven (7) additional Resolutions by December 24, 1941. Any and all remaining lien rights lapsed on and prior to October 15, 1943. The Record discloses, therefore, that, in most instances, the bonds and coupons were "outlawed" at the time the claims were filed. Nevertheless, at the instance and petition of respondents, valid liens were adjudicated in their favor.

D. The Adjudication In Favor Of Appellee Trustee's Petition For Authority To Make Distribution To Claimants On Claims Which Have Been Allowed And On Bonds And Coupons Constituting Lien Liabilities Of The Bankruptcy Estate Violates Prior Court Orders Establising Bar Dates.

The Record discloses that the Trustee has petitioned for the "allocation" of $42,148.84 to unknown holders of improvement bonds and coupons, if any, who have never filed a claim. In addition, he proposes to allocate $14,2 .00 in favor of alleged persons who didn't have bonds and coupons. Further, he has proposed to "allocate" trust assets in favor of approximately ninety (90)

lien claims that were filed more than twelve (12) years after the institution of these proceedings and in violation of bar dates entered by court order in these proceedings.

As previously mentioned, the District Court entered a sixty (60) day bar date in January of 1941, and by order dated November 28, 1941, provided in pertinent part as follows:

> "That the claims of creditors and stockholders who have not filed their claims herein should not be allowed to participate in said plan or hold any claim, interest or equity in the property of the debtor, except on order of this court for cause shown as provided by the provisions of Chapter X of the Bankruptcy Act."

It is stated in *Gardner* v. *State of New Jersey* (1947), 329 U.S. 565, 67 S. Ct. 467, with regard to the power of a federal court, in reorganization, to fix effective bar dates against lien claims even of a higher priority than special assessment liens:

> "(1,2) First. We think, contrary to the position of New Jersey, that the reorganization court had jurisdiction over the proof and allowance of the tax claims and that the exercise of that power was not a suit against the State. Section 77 deals not only with claims of private parties but with those of public agencies as well. Section 77, sub. b, defines 'creditors' as 'all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act.' And 'claims' are defined to include 'debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character.'

Id. And § 77, sub. c. (7), provides for the prompt fixing of a reasonable time within which the 'claims of creditors' may be filed and the manner in which they may be filed and allowed. The words 'all holders of claims' have no qualification and are sufficiently broad to include public agencies as well as private parties. The 'claims' of creditors include secured and unsecured claims. We find not the slightest suggestion that Congress left out the large class of tax claims which recurringly appears in reorganizations and often assumes, as here, large proportions. They are expressly included among provable claims in § 57, sub. n, of the Bankruptcy Act. 52 Stat. 840, 867, 11 U.S.C. §93, sub. n, 11 U.S.C.A. § 93, sub. n. 5. And the sweeping, all inclusive definitions of 'claims' and 'creditors' in § 77 leave room for no exception under it."

E. The Trustee's Supplemental Final Report; etc. Ignores The Duty Of The District Court, Under Rule 52 Of The Rules Of Civil Procedure, To Make Findings Of Fact In Favor Of Lien Claimants Before Adjudications Can Be Made In Their Favor.

The District Court, in one of the opinions in connection with lien Claim No. 441, (Appellants' App. in 13579, p. 31), held in pertinent part:

> "Hereinafter this court will hold a hearing to determine what amount, if any, the claimants herein and other Class 2 claimants, whose claims are found to be valid, are entitled to. In the event the court holds that the claimants are entitled to recovery, counsel for said claimants will thereupon file proposed findings of fact and conclusions of law and a proposed order."

No further hearings have been held, no claimants have tendered proposed findings, and none have been entered in connection with any claims (except 441).

The applicability of Rule 52(a) to proceedings under the Bankruptcy Act has been consistently recognized by the federal courts. In the case of *Perry* v. *Baumann, et al.* (C.C.A. 9, 1941), 122 F. 2d 409, the Court states at page 410:

> "Order 37 of the General Orders in Bankruptcy, 11 U.S.C.A. following Section 53, provides: 'In proceedings under the [Bankruptcy] Act the Rules of Civil Procedure for the District Courts of the United States (28 U.S.C.A. following Section 723(c)) shall, insofar as they are not inconsistent with the Act or with these General Orders, be followed as nearly as may be.' Rule 52(a) of the Rules of Civil Procedure provides: 'In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct an entry of an appropriate judgment.' Rule 52(a) is not inconsistent with the Bankruptcy Act or with the General Orders in Bankruptcy. It therefore should have been followed in this case."

This is further recognized in the case of *Dryblough* v. *Ware* (C.C.A. 6, 1940), 111 F. 2d 548, in which the Court held that the Bankruptcy Court must find the facts specially and state separately its conclusions of law:

> "Even where Rule 52(a) of the Federal Rules of Civil Procedure in effect, the court would nevertheless be required to find the facts specially and state separately its conclusions of law. Order 37 of the General Orders in Bankruptcy, effective February 13, 1939, 11 U.S.C.A., following Section 53 * * *"

Rule 52(a) imposes a mandatory duty upon the District Court. As stated by this Court in the case of *Application of Murra*, C.C.A. 7, (1948), 166 F. 2d 605, at page 606:

> "While the question was not raised except during oral argument before this Court, we think it is an appropriate occasion on our own volition to consider

and decide whether a District Court is required to make findings of fact and enter its conclusions of law in a proceeding of the instant character. Fairness to the parties, to the court below as well as this Court suggest the importance of such a ruling. The question requires a determination as to whether Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., following Section 723(c) is applicable. This rule provides: 'In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of an appropriate judgment * * *.'

This rule, if applicable, is mandatory. *Bach, et al.* v. *Friden Calculating Mach. Co., et al.*, 6 Cir. 148 F. 2d 407, 409-411. * * *

We are of the view, therefore, that Rule 52 is applicable to a proceeding of the instant character [naturalization proceedings] and that the court below is required to make findings of fact and conclusions of law as the basis for an appropriate judgment."

The mandatory nature of Rule 52 is likewise expressed by this Court in the case of *Dearborn National Casualty Co.* v. *Consumers Petroleum Co.* (C.C.A. 7, 1947), 164 F. 2d 332; at p. 333:

"Counsel for both sides requested the trial judge to enter findings of fact and conclusions of law, but he refused to do so. He did file a 'Memorandum Opinion', in which he found certain facts and drew certain conclusions; but it falls short of the findings of fact and conclusions of law contemplated by the Federal Rules of Civil Procedure, 28 U.S.C.A. True it is that Rule 51(a) provides: '* * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *' But, this provision does not relieve the trial judge of making adequate findings. It only relieves him from doing what some courts have ruled was a requirement, that is, filing findings of fact and con-

clusions of law, separate from opinion. Of course, a judge need only make brief, definite and pertinent findings of fact and conclusions of law. Findings in elaborate detail are as much to be avoided as the long argumentative findings and conclusions often presented by counsel for a successful litigant. However, the findings and conclusions should adequately cover the contested issues."

The Record discloses that no findings of fact and conclusions of law were made in support of the approval of the Supplemental Final Report and Petition and the adjudication in favor of 300 lien claimants, in connection with the judgment of February 10, 1966.

F. The Adjudication Of The "Allocations" Is Illegal On Further Grounds: It "Allocates" Illegal Interest; Pays A Forged Claim; Divides Up Surplus Cash Among Undisclosed City Of Hammond Special Improvement Bondholders; Ignores Cancellation Decrees Protecting The City Of Hammond; Misappropriates Trust Assets In Violation Of The Law Of The Case; And Undertakes To Violate The Bankruptcy Act With Regard To The Disposition Of Surpluses.

(1)

Illegal Interest.

As heretofore pointed out, legitimate lien claimants, even if they proved up their liens and traced the liens into the cash in the hands of the trustee were entitled to interest only up to January 13, 1941. *Sexton* v. *Dreyfus* (1911), 219 U.S. 339, 31 S.Ct. 256; *In re. Chandler* (C.C.A. 7, 1911), 184 F. 887; *Hutchinson* v. *Otis,* (C.C.A. 1, 1902), 115 F. 937; *In re. Morrison* (C.C.A. 7, 1919), 261 F. 355. The Record shows further that in the trial of the case of intervening petitioners, Ruth S. Julius, et al, Claim No.

441, among defenses urged by the Woodmar Realty Company was Objection No. 7, (Appellants' App. in 13579, p. 104), against the allowance of interest beyond January 13, 1941. That the Woodmar Realty Company prevailed in this defense can be ascertained from an examination of the Findings and Conclusion of Law No. 3, (Appellants' App. in 13579, p. 78). The Conclusions of Law were affirmed by this Court on appeal. *In the Matter of the Woodmar Realty Company* (1962), 307 F. 2d 591. Notwithstanding the law, the adjudication of the "allocations" includes thirteen (13) years' interest up to December 1, 1954.

(2)

The Luscher Claim (Claim No. 62) And Dead And Non-existent Lien Claimants.

As heretofore shown, respondent Davis was informed as to the fact that the Luscher claim was forged by Carl A. Huebner. Likewise, he was furnished with the death certificate of claimant David T. Emery and court orders entered twenty (20) years ago winding up the Maywood Bank receivership. He was informed further, with reference to the non-existence of at least thirty-two (32) of the abandoned claims. Yet to preserve the "symphony" of the auditing study, he successfully petitioned that these claims be benefited by "allocations".

(3)

Cancellation Decrees Protecting The City Of Hammond.

The Record discloses that foreclosure decrees in which the City of Hammond was a party defendant were entered in the state courts. The improvement bonds were ordered delivered up and cancelled and the rights of the

bondholders merged into the decrees. Examples of the foreclosure decrees, with reference to Resolutions 1296 and 1399, are set forth verbatim in Appellants' App. in 13579, pp. 114-132, incl. The foreclosure decrees expressly cancelling bonds and coupons, entered many years ago, are a vital concern to the City of Hammond and its taxpayers. Yet, the "auditing study" ignores all court proceedings and is predicated, allegedly, upon an examination of City Hall records, not participated in by the City Controller or by any official of the City of Hammond charged with the responsibility of keeping records.

(4)

Misappropriation Of Trust Assets In Violation Of Law.

The Barrett Law, which respondent trustee purports to give lip service to, provides in pertinent part:

> "If the property shall sell for more than enough to pay the principal, interest, attorney's fees, costs and expenses, **the surplus shall be paid to the property owner** or party lawfully and rightfully entitled thereto." (Burns' Indiana Statutes, 1963 Replacement, Vol. 9, Part 1, § 48-2721, p. 346)

Likewise, this Court in earlier appeals, 241 F. 2d 768 and 284 F. 2d 815, determined that the Woodmar Realty Company is entitled to the surplus. That there is a substantial cash surplus above and beyond the "allocations" is admitted in the Trustee's Supplemental Final Report; etc. If the Trustee had signed and delivered the checks in accordance with the settlement stipulations, as approved, the surplus would be greater by $76,000.00.

Notwithstanding the law and the rights of the parties, the "allocations" not only misapply the admitted surplus, but include, by formula, bonus "allocations" to many of the lien claimants:

> "If in any instance the available cash should be greater than the increased total liability, the excess would be reallocated on an overall percentage basis, and the resulting amounts would be added to the sums previously allocated from the sales of other parcels. This procedure was discussed with Mr. Murray and he expressed approval thereof.
>
> 6. In any case where the total of the bonds and coupons is less than the cash available for the payment thereof, interest on such bonds and coupons will be computed for the periods from their respective maturity dates to some current date. Interest beyond maturity will not be computed in any other cases. **If, after adding interest beyond maturity, there should still be a surplus of cash, such surplus will be reallocated on an overall percentage basis to all other rolls and series.**" (Auditing Procedure, Rec. in No. 13215, Exhibits 62, 62A and 63.)

(5)

Misinterpretation Of Section 66 Of The Bankruptcy Act.

It will be observed that the Trustee's petition and the allocation order result in the deposit of $42,148.84, subject to deduction for administrative expenses, into the Clerk's Office for disposition pursuant to Section 66 (11 USCA 106). The Trustee ignores the provision of the Act reading in pertinent part as follows:

> "* * * and at the same time the trustee shall file with the clerk a list of the names and post-office addresses, as far as known, of the persons entitled

thereto, showing the respective amounts payable to them."

Obviously, Section 66, "Unclaimed Moneys", pertains to provable creditors' claims, not liens or reclamation petitions, and involves instances where creditors of a bankrupt file proofs of claim which are allowed and after the "declaration and payment of dividends", as provided for in the preceding section, Section 65, (11 USCA 105), cannot be located. Respondents' distortion and misinterpretation of the Bankruptcy Act arises solely out of a desire to peserve the unprecedented "auditing study" method of distributing trust assets.

II.

THE ALLOWANCE OF $120,000.00 IN FEES TO APPELLEE HERSCHEL B. DAVIS AND $5,480.75 TO APPELLEE WALTER A. McLEAN, TRUSTEE, CONSTITUTES AN ABUSE OF DISCRETION, IS VIOLATIVE OF THE PROVISIONS OF THE BANKRUPTCY ACT, AND CONTRAVENES CONTROLLING PRECEDENTS ON THE SUBJECT OF COMPENSATION ALLOWABLE TO FIDUCIARIES.

A. The Bankruptcy Act Requires Notice, Evidence In Support Of The Fee Applications, And Findings Under Rule 52, All Of Which Are Absent In The Instant Case.

The notice required by Section 58(a) (8), (11 USCA 94(a)), although jurisdictional to the allowance of fees, was not given the City of Hammond.

Likewise, since the fee applications were put at issue by objections duly filed, the fee claimants had the burden of proof which they did not sustain since they offered no evidence. The Federal Rules of Civil

Procedure apply to hearings on fee applications. (See Supp. Rec. in 11783). The District Court was required to enter Findings and Conclusions of Law upon which to predicate an order. (In the interest of time, we refer to the citations heretofore set forth in this Brief under "Argument", I., E., supra.)

That notice is required, and failure to give notice will result in a denial of a fee petition, is held in the following cases:

In re. Plymouth Rubber Co. (7 Cir., 1924), 298 F. 598;
In re. Lahongrais (1 Cir., 1925), 5 F. 2d 899;
In re. Young (D.C. N.Car., 1906), 142 Fed. 891;
3 Collier, on Bankruptcy, § 62.38 (3), 1645-46 (14th ed. 1966).

That the petitioners have the burden of proof, and failure to offer evidence requires denial, is held in *In re. California Land Buyers Syndicate* (1938, D.C. Cal.), 22 F. Supp. 183.

B. The Public Has An Interest In The Allowance Of Fees In Federal Bankruptcy Proceedings.

"Allowances for counsel • • • must be moderate, not only in the interest of debtor and creditors, but in the public interest as well." *In re. Laister-Kauffmann Aircraft Corp.* (1952), 101 F. Supp. 950, p. 954. See also *London* v. *Snyder* (1947), 163 F. 2d 621:

> "Trustees in bankruptcy are public officers and officers of a court, and the officers of a court, like public officers generally 'must show clear warrant of law before compensation will be owing them for the performance of their public duties.'" *Callaghan* v. *Reconstruction Finance Corp.* (1936), 297 U.S. 464, 468; 80 L.Ed. 808.

See also *Realty Associates Securities Corp.* v. *O'Connor* (1935), 295 U.S. 295; 55 S.Ct. 663.

C. Vicarious Generosity Such As Exhibited By The Record And Order Below Will Not Be Upheld.

Justice McReynolds laid the foundation stone for this important rule in the case of *Newton, Attorney General* v. *Consolidated Gas* (1922), 259 U.S. 101; 42 S.Ct. 438. Chief Justice Taft, in the case of *In re. Gilbert* (1928), 276 U.S. 294; 48 S.Ct. 309, established the leading precedent stating:

> "We were desirous of making it clear by our action that the judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vicarious generosity in such a matter could receive no countenance."

See also:

Bailie v. *Rossell* (3rd Cir., 1932), 60 F. 2d 806;
Walton N. Moore Dry Goods Co. v. *Lawrance* (9th Cir., 1930), 38 F. 2d 186.

The law is aply summarized by the District Court in the case of *In the Matter of Barry Nao Company* (1959, D.C. Cal.), 172 F. Supp. 375, at p. 382:

> "**Extravagant** and **unwarranted** costs, **including attorneys fees,** had plagued honest and efficient administration of bankrupt estates, and came to be denounced as 'crying evils'. *Realty Associates Securities Corp.* v. *O'Connor,* 1935, 295 U.S. 295, 299, 55 S.Ct. 663, 79 L.Ed. 1446; and see: *Levin* v. *Barker,* 8 Cir., 1941, 122 F.2d 969, certiorari denied, 1942, 315 U.S. 813, 62 S.Ct. 799, 86 L.Ed. 1212; *In re Consolidated Distributors, Inc.,* 2 Cir., 1924, 298 F. 859; *In re Curtis,* 7 Cir., 1900, 100 F. 784. So the general policy had long been to **reduce all costs, including attorney's**

fees, to a reasonable minimum consistent with securing efficient administration and able legal counsel. See: 3 Collier on Bankruptcy, supra, § 62.05; 6 Remington on Bankruptcy, supra, § 2682; compare: Nadler, Fallacies In Judicial Attitudes Toward Legal Fees in Bankruptcy, 28 Journal of the National Association of Referees in Bankruptcy 10 (January 1954).

In 1935, the Supreme Court had admonished that interpretation of the bankruptcy laws **'must be adapted to [these] aims.'** *Realty Associates Securities Corp.* v. *O'Connor,* supra, 295 U.S. at pages 299-300, 55 S. Ct. at page 665.

Consistent with this admonition, 'old' General Order 42—the predecessor in function of § 62, sub. d [3 Collier on Bankruptcy, supra, § 62.38]—was construed so that no fees whatever were allowable without strict compliance, even though beneficial services had been rendered. See: *Albers v. Dickinson,* supra, 127 F.2d at pages 960-961; *In re Stratton,* supra, 51 F.2d at pages 987-988; *In re California Land Buyers Syndicate,* D.C.S.D. Cal. 1938, 22 F. Supp. 183, 186-187.

[4] Moreover, General Order 44 [11 U.S.C.A. following section 53]—which serves as 'the main "police" measure as to employment of counsel by receivers and trustees' [6 Remington on Bankruptcy, supra, § 2719] —has been similarly construed to require strict compliance, absent which all fees are denied. Cf.: *Woods* v. *City National Bank & Trust Co. of Chicago,* supra, 312 U.S. at pages 267-269, 61 S.Ct. at pages 496-497; *In re Woodruff,* supra, 121 F.2d 152; *In re Eureka Upholstering Co., Inc.,* 2 Cir., 1930, 48 F.2d 95.

To apply a different rule under § 62, sub. d would, no less surely than under General Orders 42 and 44, 'destroy the safeguards of the law and lessen the prevention of abuses.' *Weil* v. *Neary,* 1928, 278 U.S. 160, 173-174, 49 S.Ct. 144, 149, 73 L.Ed. 243." (Our emphasis)

D. The Fee Application Of Herschel B. Davis Fails To Meet The Standards Required By Section 62 (USCA Paragraph 102) And General Orders 42, 43 and 44.

The full itemization requirement of Section 62(d) of the Bankruptcy Act is now mandatory. Collier on Bankruptcy, 14th Edition, Vol. 3, Paragraph 62.05; page 1433. See also Collier's XVII, Application for Compensation, paragraph 62(d), page 1640. See also *In the Matter of National Accessories, Inc.* (D.C. Neb., 1936) 36 A.B.R., N.S. 281, 13 F. Supp. 278. An examination of the Davis itemization (Appendix in 15694 and 15695, pages 142 through 304) reveals complete inadequacy. Telephone conferences, work by a man named Gruenburg, etc. are referred to. Nowhere is shown the subject matter of consultations, benefits obtained for the trust, results achieved, etc. The petition identifies how, with whom, and where activities took place but without reference to their significance in connection with trust duties. See also *In re California Land Buyers Syndicate* (D.C. Cal., 1938) 22 F. Supp. 183.

E. Lack Of Loyal, Disinterested Service To The Trust Estate.

The record shows that appellees performed no service for the benefit of the estate, and, as volunteers, worked for the interests of a segment of City of Hammond special improvement bondholders in consummating an unprecedented "audit study" program which would inure to their benefit. The trustees were allowed compensation on February 10, 1966, for which the beneficiaries of the "allocations" will be required to pay additional attorneys fees. Such activities are not compensable under the law.

The leading case on this subject is *Woods* v. *City National Bank & Trust Co.*, 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820. This decision holds that the trustees and trustee's attorneys are held to the *highest standards of fiduciaries.* Where it appears that they *have any conflicting interests,* their claims for fees and expenses must be denied. Another leading case is *American United Mutual Life Insurance Co.* v. *City of Avon Park* (1940) 311 U.S. 138, 61 S.Ct. 157. These cases follow the earlier decisions of *Pepper* v. *Litton* (1939) 308 U.S. 295, 60 S.Ct. 238, *Jackson* v. *Smith,* 254 U.S. 586, 41 S.Ct. 200, and *Wiel* v. *Neary,* 278 U.S. 160, 49 S.Ct. 144. Although *even the presence of a conflicting interest* necessitates the denial of a claim, the language in *Pepper* v. *Litton,* supra, at page 248, seems unusually pertinent to these proceedings:

> "This alone would be a sufficient basis for the exercise by the District Court of its equitable powers in disallowing the Litton claim. But when there is added the existence of a 'planned and fraudulent scheme', as found by the District Court, the necessity of equitable relief against that fraud becomes insistent. No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered it was the duty of the bankruptcy court in the exercise of its equity jurisdiction to undo it. Otherwise, the fiduciary duties of dominant or management stockholders would go for naught; exploitation would become a substitute for justice; and equity would be perverted as an instrument for approving what it was designed to thwart."

See also *Meinhardt* v. *Salmon* (1928), 249 N.Y. 458, 464, 164 N.E. 545, 546:

> "Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

CONCLUSION.

It is apparent from the Record in this case that the proceedings have been prolonged because of the failure of appellees to take reasonable steps to comply with the Bankruptcy Act and to follow legitimate directives of the District Court entered in 1941. Instead of devoting efforts to an unprecedented "auditing study" project, the public interest required that lien claims be set down for hearing and judicially determined, not by a hearsay "auditing study", but by a Referee—as ordered on November 22, 1941. The fee allowances cannot stand.

Wherefore, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgment below may be reversed, and for all other proper relief.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

Nos. 15694, 15695

SEPTEMBER TERM, 1966 APRIL SESSION, 1967

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation, *Debtor,*

* * * * *

CITY OF HAMMOND, INDIANA, a Municipal Corporation,

and

WOODMAR REALTY COMPANY, a Corporation, Debtor,

Appellants,

vs.

WALTER A. McLEAN, Trustee, et al.,

Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

JUNE 22, 1967

Before KNOCH, CASTLE and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* These consolidated appeals by Woodmar Realty Company, No. 15694, and the City of Hammond, Indiana, No. 15695, challenge the district court's judgment overruling their objections to the Trustee's Supplemental Final Report and to the fee and ex-

pense allowances for the Trustee and his attorney in the Woodmar bankruptcy proceeding. We affirm.[1]

WOODMAR

Woodmar contends that the Trustee's motion for summary judgment resulting in the orders entered July 24, October 10 and December 31, 1963, and May 15, 1964, allowing claims against the bankrupt estate was unauthorized under FED. R. CIV. P. 56 and the precedents and should have been stricken.

Since we wish to aid in the termination of this long pending proceeding, we are not disposed to treat this contention as waived by Woodmar's failure to appeal from these final orders.[2]

The parties agreed in 1957 that a typical lien claim, No. 441, and Woodmar's objections be tried as a "test case" to establish the law for determination of the 313 claims pending. The case was tried, with the Trustee excluded from participation, and in July, 1961, the district court entered judgment overruling as meritless Woodmar's objections and allowing the claim. Subsequently Woodmar appealed, and this court affirmed on August

---

(1) A motion was made in this court to dismiss Woodmar's appeal for lack of standing because (a) in 1964 this court decided it had lost its previous standing, In re Woodmar Realty Co., 306 F.2d 479 (7th Cir. 1962), cert. denied, 380 U.S. 952 (1965), and (b) Woodmar's 1965 purchase of three claims without court approval did not give it standing but rather gave it a claim against itself or extinguished the claim. We prefer not to dismiss the appeal because there is language in the opinion in the above case which may have misled the bankrupt into the anomalous position of asserting standing because of claims bought with money borrowed from one of its directors. Id. at 480.

(2) This bankruptcy proceeding is twenty-six years old. It commenced as a Chapter X reorganization proceedings in 1941 and became by order a straight bankruptcy proceeding in 1953. Since 1953 there has been a more or less continuous course of litigation, including eight appeals from the judgments of four district court judges, Judges Steckler, Swygert (now Circuit Judge), Parkinson (later Circuit Judge and now deceased), and Tehan.

In a final district court order of February 24, 1960, Woodmar's previously acquired authority to settle claims against the estate was revoked. On October 10, 1963, the district court decided Woodmar no longer had standing as a party "in these proceedings." No appeal was taken by Woodmar. On September 23, 1964, this court dismissed by order an appeal by Woodmar and held that "appellant is no longer a party in interest and lacks standing to appeal." In re Woodmar Realty Co., No. 14756, 7th Cir. April 28, 1964. This dismissal presumably motivated purchase of the claims by Woodmar in 1965 so as to regain standing to object to the Trustee's petition for approval of the Supplemental Final Report. For purposes of this opinion, we assume but do not decide that Woodmar has standing.

20, 1962. *In re Woodmar Realty Co.*, 307 F.2d 591 (7th Cir. 1962).

On November 29, 1962, the district court ordered Woodmar to file statements to disclose wherein the decision on claim 441 was not, as stated in the Trustee's motion, controlling as to all lien claims. The statement was filed by Woodmar with respect to 132 of the more than 300 claims. The court reviewed the statement in exhaustive opinions, and found that the decision on claim 441 was determinative of all the claims. Thereafter it entered the several orders allowing the claims.

We think that it would be unconscionable at this late stage of the proceedings to set aside the district court's orders, upon the ground that the Trustee's motion was unauthorized—a ground that could and should have been, but was not, presented here for decision in timely appeals.

Even if literally the Trustee falls outside Rule 56,[3] which we do not decide,[4] we hold that in view of the long history of this litigation, the stipulated test case for all claims and the failure of Woodmar to respond to the court's order to present facts requiring hearing, a proper administration of justice requires that the judgment before us be affirmed. We think the judgment appealed from is right and we are not disposed to say under the particular facts here that it must fall because the Trustee was permitted at an earlier stage to make a motion for summary judgment.

We do not view the Trustee on this record as having taken a position inimical to the bankrupt estate or violative of his trust. We think his obligation was to do what he did, under the circumstances, *i.e.*, seek in summary

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(3) Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(4) But see In re Yellow Transit Freight Lines, Inc., 207 F.2d 602, 604 (7th Cir. 1953); Beall v. Pinckney, 132 F.2d 924 (5th Cir. 1943).

fashion to terminate the proceeding in a just and prudent way with the court's approval. *Cf. In re Woodmar*, 294 F.2d 785, 793 (7th Cir. 1961), *cert. denied*, 369 U.S. 803 (1962). We presume that a bankrupt, in whose shoes the Trustee stands, *In re Woodmar*, 294 F.2d at 793, would under all the circumstances here deem it his obligation to see that lien creditors with valid claims lawfully received as soon as practicable what was due them from assets fairly available.

We consider to be wholly meritless Woodmar's argument that the district court's order of November 29, 1962, requiring filing of statements by Woodmar as to the Trustee's motion for summary judgment, was an abuse of discretion under FED. R. CIV. P. 16. In view of the previous trial testing claim 441, we think the order was clearly justified under Rule 16 in the circumstances of this case.[5]

We turn now to the judgment before us entered by the district court on February 10, 1966, pursuant to a hearing upon the Trustee's Supplemental Final Report and petitions for fees by the Trustee and his attorney. The judgment "denied" objections of Woodmar and the City of Hammond (holder of claims Nos. 261, 507, 450 and 235), to the Report and petitions, and so far as pertinent on this appeal, ordered payment of all claims with limitations as to some; allowed the Trustee fees of $5,205.75 and expenses of $729.96; allowed Trustee's attorney fees of $120,000 and expenses and reimbursals of $3,300.96; and approved the Supplemental Final Report.

We think the law settled in the trial of claim 441 answers Woodmar's argument that the first two appeals to this court[6] precluded the district court from ordering payment of the claims without giving Woodmar the opportunity to be heard as an adversary. Woodmar, after that trial, had no "right" to contest each claim it objected

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(5) Rule 16. Pre-Trial Procedure; Formulating Issues
In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
(1) The simplification of the issues;
* * *
(6) Such other matters as may aid in the disposition of the action.

(6) In re Woodmar Realty Co., 241 F.2d 768 (7th Cir. 1957), and 284 F.2d 815 (7th Cir. 1960).

to, unless it produced facts or issues not then known or presented or decided in that trial. And the district court decided in final unappealed orders on the basis of the claim 441 decision that no new facts or issues were presented in opposition to the Trustee's motion for allowance of the claims. The failure of Woodmar to respond sufficiently to the court's November 29, 1962, order by raising genuine material issues of fact precludes it from now claiming violation of due process rights in denial of a hearing on each claim objected to.

No question can now be raised by Woodmar with respect to the validity of the qualified payments ordered in the judgment to "32 lien claims involving dead persons," etc. These claims were allowed by the district court under the Trustee's motion for summary judgment. Woodmar did not appeal from the order of allowance. There was no need to require proof again of those claims. Similarly, there was no reason to retry the 102 claims which Woodmar had compromised in 1957 and 1958. The compromises were set aside by the district court on April 28, 1964, upon petitions of certain lien creditors seeking relief from the compromises. The court then ordered allowance of the claims in the amounts found due by the Trustee. This court dismissed Woodmar's appeal from an order denying a motion to strike those claims on the ground that the order was non-appealable. 307 F.2d 595 (7th Cir. 1962).

Finally, Woodmar challenges the fees and expense allowances as an abuse of discretion. It contends no evidence was received or permitted at the hearing, that the district court's opinion underlying the allowances was based on bias and prejudice against Woodmar and its counsel, that the court did not find any benefit to the estate from the services rendered, and that the allowances violated federal standards. There is no merit in any of these contentions.

For more than twelve years' service (or 1,530½ hours) in this proceeding, the court allowed the Trustee the fee of $5,207.75, the maximum permitted under 11 U.S.C. § 76(a) and the predecessor of 11 U.S.C. § 76(c)(1) (1964).[7] Averaged out, the allowance is about $3.50 per

[7] The services commenced before 1956.

hour for work done and to be done in winding up the estate. We find no basis for Woodmar's claim of bias and prejudice.

There was no need for taking evidence at the hearing. Woodmar filed eleven pages of objections to the Trustee's report. The court found that except for three paragraphs the objections "are almost an exact copy" of parts of objections made to the Trustee's Report in April, 1958, and subsequently decided against Woodmar, and that these three paragraphs ignored the decision in 1958 upon test claim 441 which effectually overruled the objections in the paragraphs. We find meritless the contention that the Trustee's services did not benefit the estate. The record and district court's opinion fully refute the contention.

The court found that the allowance of $120,000 to the Trustee's attorney "constitutes reasonable compensation for work done and to be done" in winding up the estate. Woodmar offers no persuasive reason why Trustee's counsel, who has served since early 1953 and spent a total of 567½ days (or 1605¾ hours) involving much litigation in the district court, this court and the Supreme Court, should not have received the allowance the court granted. We see no reason for disagreement with the findings of the court and we find no abuse of discretion in the allowances made to the Trustee and his attorney.

CITY OF HAMMOND

What we have said in discussing the contentions of Woodmar settles the contention of Hammond, owner of three claims allowed in the amount of $5,968.28, that the Trustee was obliged to object to all of the lien claims. The test case of claim 441 in 1958 and the 1963 summary judgment proceedings rejected the same contentions that Hammond now advances that the liens upon which the claims are based had lapsed under Indiana law and that certain "bar dates" set in the original Chapter X proceedings in 1941 barred approximately 90 of the claims allowed. These contentions have no merit. *In re Woodmar Realty Co.*, 307 F.2d 592, 594 (7th Cir. 1962).

Hammond complains that no specific findings of fact underlying lien allowances were made under Rule 52(a). Specific findings were unnecessary, since the orders pursuant to the motion for summary judgment allowing the claims found that no genuine material issues of fact were presented. *A R Inc.* v. *Electro-Voice, Inc.*, 311 F.2d 508, 513 (7th Cir. 1962). We see no reason to consider the challenge now made as to inclusion of "illegal interest" in allocations to claimant. The time for this challenge was upon the allowance of orders in the summary judgment proceedings. All other Hammond contentions, such as those with respect to the Luscher and "dead" and "nonexistent" lien claimants, the effect of state foreclosure decrees on the liens and the "misappropriation" of trust assets are no longer viable.

We have in resolving Woodmar's contentions with respect to the fee and expense allowances of the Trustee and his attorney answered all arguments against the allowances presented by Hammond.

The Supplemental Final Report recommended: payment of 272 lien claims set forth on Exhibit A to the final report, claims in which the bonds and coupons were filed with the claim; the payment "only upon presentation of the bonds and coupons" of 43 lien claims set forth on Exhibit B to the final report, claims filed by "alleged" owners who had not filed bonds or coupons; and the allocation of $43,677.97 to unpaid lien indebtedness of the estate for which no claims had been filed, shown on Exhibit C.

The district court judgment ordered "payment . . . now" on claims listed in Exhibits A and B, subject to proper deductions for administrative expenses, upon presentation of bonds or coupons or "other satisfactory proof of ownership." The Trustee was ordered to pay the amounts allocate to claims listed in B into the clerk's office for disposition in accordance with section 66 of the Bankruptcy Act, 11 U.S.C. § 106 (1964), and 28 U.S.C. §§ 2041-42 (1964), and these amounts are to remain there until ownership is established in the manner provided. Payment "now" was ordered on claims listed on Exhibit C with

the same provision in respect to payment to and disposition by the clerk as given for those on Exhibit B.

We are not persuaded by Hammond that the order with respect to Exhibit C claimants is in error because section 66 of the Act does not apply since it presupposes claims that are provable and not "unproved liens." Hammond offers no legal or equitable alternative to the statutory scheme applied by the court.

The Trustee's motion to dismiss Woodmar's appeal, taken with the case, is denied. The judgment is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division
* * (Caption — No. 3151) * *

(Filed February 10, 1966)

ORDER.

Hearings having been had in this matter on October 22, 1965, on the Trustee's Supplemental Final Report, and on all objections filed thereto, and on the petitions for the determination of and the allowance of fees and expenses filed by the trustee, Walter A. McLean, and by Herschel B. Davis, as attorney for the trustee, and on all objections filed to such petitions, and the court having filed its written opinion on January 19, 1966, as to the matters before the court at such hearing, now, therefore, for the reasons set forth in the court's Opinion and in accordance therewith,

It Is Ordered:

1.

That the objections filed by the City of Hammond, Indiana, claimants in Claims Nos. 261, 507, 450 and 235 to the Trustee's Supplemental Final Report, are now denied.

2.

That the objections to the Trustee's Supplemental Final Report filed by Betty Bassett and Grace Ellerman, claimants in Claim No. 531, are now denied.

3.

The Trustee's motion to strike out the objections filed by Woodmar Realty Company to the Trustee's Supplemental Final Report, is now denied.

4.

That the objections filed by Woodmar Realty Company to the Trustee's Supplemental Final Report are now denied.

5.

The Motion filed by the bankrupt, Woodmar Realty Company, on May 19, 1958, to strike out and/or to dismiss Trustee's Amended Final Report, is now stricken from the files.

6.

The claim filed with the trustee by the auditing firm of MacDiarmid, McCall & Co., for the balance of its auditing fees in the sum of $1,671.00, is now by the court approved and ordered paid.

The payment by the trustee to John Kettas, CPA, in the sum of $200.00 for auditing fees, is now approved.

7.

The objections filed by the City of Hammond, Indiana, to the petition of Walter A. McLean, as Trustee, for the determination and allowance of fees and expenses are now denied.

8.

The objections filed by the City of Hammond, Indiana to the petition of Herschel B. Davis, Attorney for the trustee, for the determination and allowance of fees and expenses are now denied.

9.

The objections filed by Woodmar Realty Company to the petition of Walter A. McLean, as Trustee, for the determination and allowance of fees and expenses, are now denied.

10.

The objections filed by Woodmar Realty Company to the petition of Herschel B. Davis, as Trustee's attor-

ney, for the determination and allowance of fees and expenses are now denied.

11.

The following claims listed in Exhibit A attached to the Trustee's Supplemental Final Report and described in detail in such Report, filed on unpaid special assessment bonds and coupons constituting secured claims in this proceedings which claims are each supported by an affidavit alleging that the bonds and securities described in such claims were owned by the claimant but that such bonds and coupons had become lost or mislaid, are now allowed by the court in the following amounts:

Claim 284	Deere & Co.	$ 29.76
Claim 139	Ellen Hutt Scheedle, Beatrice H. Bleiweiss and Margaret Hutt	387.90
Claim 63	Lee Martin, Ruth Martin Moore and Esther Martin, as Guardian of Ross Martin, Jr.	822.33
Claim 171	Mrs. L. M. Casper	470.75

12.

The following new claims, listed in Exhibit A attached to the Trustee's Supplemental Final Report and described in detail in such Report, filed on special assessment bonds and coupons constituting lien obligations of the bankrupt, Woodmar Realty Company, are now allowed by the court as follows:

Claim 544	Emma Wassman	$207.65
Claim 545	Mary A. Magginis and Veda Woodward	300.67
Claim 546	Helen G. Shanklin, Executrix of the Estate of Robert C. Shanklin	253.48
Claim 547	Edward L. Baker	512.91
Claim 548	Henry J. Schuh	336.51
Claim 549	Frieda Harbeck	814.33

13.

The special assessment bonds and coupons listed and described in Exhibits A, B and C, attached to and made a part of the Trustee's Supplemental Final Report, are now adjudged to be unpaid lien obligations in this bankruptcy proceeding and such bonds and coupons are entitled to payment in the amount of the cash allocation recommended in such Exhibits less a proportionate deduction for the payment of the costs of administration herein.

14.

Payment shall be made on all of the special assessment lien indebtedness in this matter as follows:

a) Payment is now ordered to the claimants listed in Exhibit A in the amounts for which such claims have been allowed, all as listed and described in Exhibit A, subject however, to a proportionate deduction for the payment of the costs of administration in this proceeding.

No payment shall be made, however, on any claim unless the bonds and coupons which are the basis of the claim are produced and filed with the court or unless other satisfactory proof of ownership is furnished in accordance with the provisions of the Bankruptcy Act.

b) Payment is now ordered and directed on all of the bonds and coupons listed and described in Exhibit B in the amount of cash allocated to each bond and coupon in Exhibit B, subject, however, to a proportionate deduction for the payment of all costs of administration.

It is further provided that no payment shall be made to any claimant or on any bond or coupon unless the bonds and coupons which are the basis of the claim are produced and filed with the court or unless other satisfactory proof of ownership is furnished in accordance with the provisions of the Bankruptcy Act.

Until ownership of such bonds and coupons listed in Exhibit B is established and until such bonds are produced, or until satisfactory proof is furnished as to the ownership of such bonds and coupons, in accordance with the provisions of the Bankruptcy Act, the Trustee shall pay the amounts allocated to such special assessment bonds and coupons, less a proportionate deduction for administrative expenses, into the Clerk's office of this court for disposition in accordance with the provisions of Section 66 of the Bankruptcy Act and in compliance with Sections 2041 and 2042, Title 28, U. S. Code.

c) Payment is now ordered and directed on all of the bonds and coupons listed and described in Exhibit C in the amount of cash allocated to each bond and coupon in Exhibit C, subject, however, to a proportionate deduction for the payment of all costs of administration in this proceeding.

It is further provided, however, that no payment shall be made to any claimant or on any bond or coupon for the amount allocated to bonds and coupons in Exhibit C unless the bonds and coupons which are the basis of the claim are produced and filed with the court, or unless other satisfactory proof as to ownership is furnished in accordance with the provisions of the Bankruptcy Act.

Until the ownership of the bonds and coupons listed in Exhibit C is established and until such bonds are produced, or until other satisfactory proof is furnished as to the ownership of such bonds, in accordance with the provisions of the Bankruptcy Act, the amounts allocated to payment for such bonds and coupons, less a proportionate deduction for administration costs, shall be paid by the trustee into the Clerk's Office of the court for disposition in accordance with Section 66 of the Bankruptcy Act, and likewise in accordance with Sections 2041 and 2042, Title 28, U. S. Code.

15.

The claim of Walter A. McLean for an allowance for his services as trustee is now allowed in the sum of $5,205.75.

The claim of Walter A. McLean for expenses incurred by him as trustee is likewise allowed in the sum of $729.96.

Such sums are ordered paid as a cost of administration in this proceeding.

16.

The claim of Herschel B. Davis for an allowance for services as attorney for the trustee is now allowed in the sum of $120,000.00.

The claim of Herschel B. Davis for expenses incurred by him as attorney for the trustee is now allowed in the sum of $1,800.96, and the further claim of Herschel B. Davis to be reimbursed for the sum of $1,500.00 expended by him in defending himself against charges brought by the bankrupt is now likewise allowed in the sum of $1,500.00.

Such sums are ordered paid as a cost of administration in this proceeding.

17.

The Trustee's Supplemental Final Report is now in all things approved.

18.

The Trustee's Financial Report filed on October 22, 1965, is now approved.

Enter:

This 10th day of February, 1966.

/s/ Robert E. Tehan
Judge, U. S. District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division
(Caption — No. 3151)

(Filed January 19, 1966)

OPINION.

After twenty-five years of bitter controversy, these bankruptcy proceedings which commenced under Chapter X of the Bankruptcy Act have reached the stage where every lien claim against the bankruptcy estate and every objection to claims has been ruled upon. The great majority of lien claims recommended for allowance by the trustee have been allowed by separate order, each order setting forth the amount in which the claim is allowed. The orders allowing claims were entered in 1963 and 1964, and no appeals therefrom were taken either by the respective claimants, who might have expressed by appeal dissatisfaction with the amounts in which the claims were allowed, or by the bankrupt, which could have expressed by appeal dissatisfaction with the allowance of claims and the rulings on its objections.

In July of 1965, the trustee filed his supplemental final report herein, requesting authority to make certain distribution of funds and requesting a determination of costs of administration. Objections thereto were filed by the bankrupt and by the claimants in Claim No. 531.[1] The report and the objections, which the trustee moved to strike, came before the court at the final meeting of

[1] A letter objection from claimant George R. Williams was denied orally on October 22, 1965.

creditors held pursuant to notice on October 22, 1965. At that hearing, objections filed by the City of Hammond as claimant in Claim Nos. 261, 507, 450 and 239[2], after denial of its motion for a continuance, were also called for hearing.

Although the trustee's motions to strike objections are clearly meritorious, we prefer not to act on those motions, choosing rather to consider all objections on their merits in order that a complete record may be had.

Objections Of The City Of Hammond And The Claimants In Claim No. 531.

These objections, which are startlingly similar, were called for hearing pursuant to notice on October 22, 1965. No one appeared on behalf of the claimants in Claim No. 531, and counsel for the City of Hammond, when called upon to present his position, merely expressed satisfaction with the argument previously presented by counsel for the bankrupt and requested an opportunity to investigate and substantiate its position with respect to Paragraph 6 of its objection. In order that their respective positions might be before the court, counsel for those objectors were granted leave to file memoranda within ten days in support thereof. No memoranda have been filed as of this date. We might assume therefore that the claimants in Claim No. 531 have abandoned their objections and that the City of Hammond has recognized the invalidity of and abandoned its objection in Paragraph 6. Nevertheless, a discussion of the objections follows.

In Paragraph 1 of the objections, the objecting claimants state that no notice was given them and no copies of papers filed on July 6, 1965 were served on them or their counsel. Court records reveal that notice of the final meeting of creditors was mailed timely to counsel of record for the objecting claimants. Service of the

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[2] The City actually meant Claim No. 235, not 239.

supplemental final report, etc. on the claimants is not required since, under General Order 12, they must be furnished only with a summary thereof. The notice mailed to their attorneys pursuant to this court's order contained a proper summary.

Paragraph 2 of the objections states that the claimants are unable to admit or deny the allegations in the report and demand strict proof thereof. If the objecting claimants are unable to admit or deny the allegations of the trustee, their inability results primarily from a reluctance to engage in the work of checking the records in this case, since the allegations contained in the report are drawn from the record. Neither the court, the trustee and his counsel or other parties in interest can on the strength of this paragraph b put to the time, expense and inconvenience of a lengthy hearing by an unwarranted demand for strict proof of facts which the objecting claimants have not even put in issue.[3]

Paragraph 3 of the objections states that the trustee proposes an illegal method of distribution in violation of the objecting claimants' rights to prove their claims and trace their liens. All of the claims held by the objecting claimants have been allowed in specific amounts, with the exception of Claim No. 235 which was disallowed on December 31, 1963. Orders allowing Claims Nos. 261, 450 and 507 were entered on October 10, 1963. An order allowing Claim No. 531 was entered on May 15, 1964. If the objecting claimants had any quarrel with the amounts allocated to their claims, they should have appealed from those orders and cannot be heard now, long after the time for appeal has expired, to complain that their rights to prove claims and trace liens are violated. Paragraph 3 can only be considered an attempt by the claimants to

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[3] If the objectors, after investigation, doubted an allegation, they should have denied it.

obtain a greater allowance on their claims.[4] However the amounts to which they are entitled have been finally determined.

Paragraph 4 of the objections protests diminution (of what, is not stated but we assume claimants mean diminution of the amount allocated to their claims) through payment of administrative expenses and allocation of funds to bonds and coupons which constituted a lien on real estate of the bankrupt sold herein but the ownership of which has not been established.[5] Insofar as the claimants protest such allocation, they are again attempting to recover larger amounts on their own claims, the amounts of which have been finally determined. They have alleged nothing to indicate why they, unlike all other claimants herein, should escape all expenses of this long administration.

In Paragraph 5, the objecting claimants state that lien claimants are required to appear in open court and prove their ownership[6] and rights to assets. We do not know why these claimants demand to prove what has already been established by order of this court thus needlessly and senselessly seeking to prolong this twenty-five year old litigation. The lack of necessity for a hearing has been adequately discussed in this court's opinion of September 23, 1963. (See in particular Page 10 of that opinion)

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[4] We are certain that the claimants are not seeking an opportunity to prove claims and trace liens in amounts less than those already awarded them by the court.

[5] Exhibits B and C to the supplemental final report propose such an allocation. The objecting claimants do not deny that the bonds and coupons referred to therein affected the bankrupt's realty or are unpaid.

[6] The objecting claimants have demonstrated possession of the bonds and coupons on which allowances were made which, as we stated in Claim No. 441, proves ownership.

The City of Hammond, in Paragraph 6 of its objections, which paragraph is not contained in the objections of the other claimants, expresses fear that the trustee's allocation will subject it to suits and create problems. At the hearing of October 22, 1965, the City was unable to explain how the payment by the trustee out of funds never held by the City would in any way subject it to litigation, and as stated previously failed to file a memorandum in support of its position though afforded an opportunity to do so. Absent any argument, specification or even indication of disadvantage, we fail to see how disbursement of funds out of this court with a proper record kept can prejudice the City in any fashion.

The objections of the City of Hammond and of the claimants in Claim No. 531 to the trustee's supplemental final report are without merit. Insofar as they purport to be objections to the original final report they are likewise without merit.

Objections Of The Bankrupt.

As stated previously, we will consider the bankrupt's objections to the trustee's supplemental final report, some eleven pages in length, on their merits, without regard to the problem of whether the bankrupt, either as the bankrupt or as the recent purchaser of several small lien claims, has standing to object. In stating that we will consider the objections on their merits, however, we merely mean that we will not refuse to consider them, nor will we strike them, because of the lack of standing on the part of the bankrupt to object.

The objections, which the bankrupt filed on October 8, 1965, are, with the exceptions of Paragraphs 7, 8 and 9 thereof, an almost exact copy of portions of its amended objections dated April 29, 1958, to the trustee's final report. In merely reiterating its objections and in the content of the additional Paragraphs 7, 8 and 9, the bankrupt completely ignores the fact that since 1958 a test claim, Claim No. 441, was decided, that every lien claim

was examined in the light of the test case, that separate orders allowing most of those claims have been entered, that the amount which each claimant is entitled to receive has been established by orders entered herein in 1963 and 1964, that all of the bankrupt's objections to claims have been fully considered and held to be without merit, including objections as to amount and objections raising bar dates, statutes of limitations, etc., that it has been ruled that the trustee was under no duty to raise specious objections to claims, and that the lien liability against the bankrupt estate has been finally established.[7] The bankrupt has also either intentionally distorted or simply failed to understand the manner in which the lien claimants will be paid.[8] It further indefatigably argues that

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[7] The bankrupt has stated in Paragraph 9 of its objections that orders allowing claims were "*only pro rata* and not final." The orders established definitely the amount recoverable in each claim and were final orders from which the bankrupt or claimants could have appealed and from which no appeals were taken. Provisions in the orders reserving to claimants a right to claim additional funds should additional funds become available did not affect the finality of the orders. Even if they had, the finality was unquestionably established when the source of additional funds was closed, that is, when settlement agreements were set aside by order of this court dated April 28, 1964.

[8] The bankrupt persistently insinuates that claimants will be paid without producing bonds or coupons or satisfactorily establishing ownership thereof. The trustee and the court have never so indicated. Any order directing payment will, of course, provide that the claimant must produce his bonds and coupons before payment be made and that copies thereof must be furnished for the claim file should originals be removed under order of court, unless the court directs otherwise. In producing the bonds and coupons, each claimant will establish possession and, as we stated previously, possession of these bearer bonds has been held to prove ownership. If the possessor is not the owner, it is the true owner, not the bankrupt who can complain.

claimants must prove their claims, implying that this presupposes a full scale court hearing on each claim, forgetting that the filing of a proper proof of claim itself constitutes proof, absent valid objection, and that the bankrupt has had the opportunity and failed to raise valid objections. We suggest that counsel for the bankrupt read our opinions and that of the Court of Appeals regarding Claim No. 441, and our opinions of May 20, 1963, September 23, 1963 and April 28, 1964, dealing with the remaining lien claims, which opinions are incorporated herein by reference. Those opinions and the entire record herein establish conclusively the lack of merit of the bankrupt's objections. The raising of such objections at this stage of the proceedings can only be considered as harassment of the trustee and parties in interest and as an insult and affront to the court. To dignify the objections by a lengthy discussion of what has been exhaustively treated previously would be unseemly.

In May of 1958, long before the supplemental final report was filed, the bankrupt moved to strike and/or dismiss the trustee's amended final report. Counsel for the trustee has moved to strike out that motion on the ground that the bankrupt is not a party in interest. Since we are here treating the bankrupt's arguments and pleadings as if it were a party in interest, we will not strike its motion on that ground. It must, however, be stricken because it has not been directed to the supplemental final report and because it sets forth matters which are wholly antiquated or without merit in the light of the decisions of this court and the Court of Appeals since 1958.

Trustee's Final Report.

The supplemental final report which came on for hearing pursuant to notice on October 22, 1965 brings up to date the final report filed originally in 1955 and the amended final report filed in 1958. It reflects the fact that since those reports were filed the claims recommended for allowance by the trustee have been allowed, the bank-

rupt's objections thereto have been considered and held to be without merit, and the bankrupt has been held to be not a party in interest. It further recites certain changes in ownership of bonds and coupons constituting a lien against assets of the bankrupt, and changes in allocations.

Because no meritorious or valid objection has been raised to the supplemental final report, as our prior discussion herein reveals, the court could properly state without discussion that it has reviewed that report and the record herein and determined that the report must be approved. However, due to the complicated nature of these proceedings, the length of time they have been pending and the possibility of distortion of fact due to the very immensity of the record, some limited discussion would appear to be in order.[9]

The trustee recites and the record reveals that when these proceedings commenced the bankrupt was the owner of considerable real estate which was encumbered by special assessment liens arising under Indiana's Barrett law. The real estate was sold or transferred in these proceedings free and clear of such liens which were transferred to the proceeds of the sales.[10] The duty then devolved upon the trustee to investigate to determine what liens existed and to determine what funds were available to satisfy them.

Claims were filed by the holders of most, but not all, of the Barrett law bearer bonds and coupons which affected property of the bankrupt. In its opinions respecting those claims, particularly its opinion of September 23, 1963, this court laboriously considered each assessment

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[9] We see no need to discuss the minute details of the report, such as treatment of newly filed claims or claims on which bonds and coupons have recently been produced, since no proper challenge thereto has been made.

[10] Some complication here arises because some of the property was transferred to satisfy another indebtedness.

roll under which claims were made and the bankrupt's contentions with respect thereto and determined that certain rolls constituted valid liens against property of the bankrupt.

In the supplemental final report, the trustee has recommended that the bonds and coupons listed in Exhibits A, B and C,[11] forming a part of his report, be adjudged unpaid lien liabilities of the bankruptcy estate, entitled to priority. Such an adjudication has in effect already been made as to Exhibits A and B, and since no claim of payment has been raised as to bonds and coupons listed in Exhibit C and since the rolls involved in Exhibit C have all been held to have affected the property of the bankrupt when these proceedings commenced, the bonds and coupons listed therein can be and now are held to be unpaid lien liabilities of the bankruptcy estate.

Payment can be and now is ordered to claimants listed in Exhibit A, who have satisfactorily established their

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[11] Exhibit A lists all claims on which bonds and coupons or other satisfactory proof of ownership have been produced. These claims have all been allowed in specific amounts. Exhibit B lists all claims on bonds and coupons on which payments are due but which have not been produced. These claims have all been allowed in specific amounts, but payment thereof will be withheld until the bonds and coupons are produced or the court is otherwise furnished with satisfactory proof of ownership. Exhibit C lists outstanding bonds and coupons in rolls which we have held to constitute liens against the bankruptcy estate, upon which bonds and coupons no claim has been filed. This record lien liability must, of course, be recognized by the trustee although no claims are filed, since lien claimants are under no obligation to file claims and the trustee must honor all valid claims. (While the bankrupt has asserted that these rolls are no longer liens, an assertion which the court has held to be erroneous, it has never claimed that Woodmar has satisfied its lien liability.)

ownership of the bonds and coupons on which their claims have been allowed, in the amount in which such claims have been allowed, subject to a proportionate charge for costs of administration. A like order can be entered as to claims in Exhibit B when bonds and coupons are produced or other satisfactory proof of ownership furnished. When proper proof of ownership is filed as to bonds and coupons listed in Exhibit C, payment will be ordered in the amounts allocated to those bonds and coupons in the trustee's report, subject to a proportionate charge for costs of administration.[12] Until ownership of bonds and coupons listed in Exhibits B and C is established, the trustee will pay the amounts allocated thereto as provided in §66 of the Bankruptcy Act and in accordance with §2041 and §2042, Title 28, U.S.C. subject to a proportionate deduction for costs of administration.

The accounting fees set forth in the supplemental final report at Page 38 are hereby approved and ordered to be paid.

The amount due the Referees' Salary and Expense Fund must be computed on the amount available for distribution to creditors. This will not be fixed with certainty until the time for appeal of our orders regarding costs of administration has expired or appellate procedures have been exhausted. We will compute the amount due the Referees' Salary and Expense Fund at that time.

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[12] In our opinions with respect to Claim No. 441 and in our opinion of September 23, 1963, we discussed at length the amounts in which claims were allowed. We need not therefore repeat here a discussion of amounts allocated to claims to dispose of the bankrupt's contentions regarding amounts. While ownership of bonds and coupons involved in Exhibits B and C is not established, it has been established that those bonds and coupons are unpaid lien liabilities of the estate. The bankrupt, even if it were a party in interest, would have no standing to question ownership.

Petitions Of Trustee And Trustee's Attorney For Fees And Expenses.

On February 16, 1953, an order was entered in these proceedings, which had commenced in 1941 under Chapter X of the Bankruptcy Act, adjudging the debtor, Woodmar, bankrupt and directing that bankruptcy be proceeded with. Walter A. McLean, who had been appointed trustee in the Chapter X proceedings in December of 1952, and Herschel B. Davis, who had been appointed attorney for the trustee in May of 1950, thereafter became trustee and trustee's attorney respectively in the straight bankruptcy and have acted in those capacities to the present time. Their petitions for fees and expenses cover the straight bankruptcy period of these proceedings.

As their petitions and the record herein reveal, neither the trustee nor his attorney has been provided with a sinecure. The questions with which they had to cope concerning lien rights against the estate and apportionment of funds were highly complex. And the complexities confronting them were intensified by the activities of the bankrupt which (1) insisted on repeatedly raising specious objections to claims, (2) irresponsibly charged the trustee and his attorney with fraud, (3) resisted any attempt to honor valid lien claims even after it should have recognized that its objections to such claims lacked any merit, and, (4) in its campaign of obstructionism filed eight appeals and nine petitions for mandamus with the Court of Appeals and three petitions for rehearing and two petitions for certiorari following decisions of that court.[13]

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[13] A party normally is not criticized for vigorous prosecution of his case. In this case, however, counsel for the bankrupt has refused to acknowledge the existence of hundreds of rulings against his position. He has also blithely ignored the adverse decisions of the Court of Appeals.

In the performance of their duties, the trustee and his attorney investigated lien claims against this estate and determined that most of those claims were valid and should be allowed and the extent of the lien rights against the estate, determinations which this court has held to be correct. These determinations were made by 1955. Since that time the bankrupt, and the bankrupt alone, has impeded the closing of this estate and the only persons with sufficient interest to withstand its attack were the trustees and his attorney.[14]

At the hearing of October 22, 1965, the City of Hammond filed objections to the fee petitions of the trustee and his attorney. Its counsel stated that he was unprepared to proceed and the court granted him ten days within which to present his specifications of objection and argument in writing. Nothing has been filed as of this date. Absent any showing to the contrary, we hold those objections to be without merit. As was the case with its objections to the final report the City, in merely denying possession of information with which to plead, cannot require "strict proof."

The bankrupt, of course, has also objected to the petitions of the trustee and his attorney for fees and expenses,[15] but has challenged no specific item in the verified itemizations of time spent and expenses incurred attached to such petitions.

With respect to both petitions the bankrupt charges, as he has continuously charged, that the trustee and his counsel, in recommending payment of lien claims and

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[14] Their interest, of course, arose out of their duty as arms of the court. The bankrupt's interest was in regaining approximately a half million dollars. No lien claimant had sufficient interest, financially or otherwise, to wage war on that large a scale.

[15] The trustee's motion to strike those objections will be denied.

resisting the bankrupt's attempts to secure the disallowance thereof, have violated their duty to defend the estate. It is and has been the bankrupt's position that the trustee's duty to preserve the estate requires him to resist even those claims against the estate which he believes to be valid and is, in effect, a duty to represent, or attempt to preserve the assets for, the bankrupt. This position is absurd. The trustee has a duty to preserve the assets for those entitled to them, and to defend the estate against invalid claims, and his failure to raise non-meritorious objections to valid claims in no way violates that duty. In fact, had the trustee raised himself the objections to claims raised by the bankrupt, he would rightfully have been subject to criticism for wasting assets of the estate in worthless litigation.

The trustee and his attorney are also charged by the bankrupt in its objections with failure to perform services benefitting the estate and with delaying its closing. As stated previously, it is the bankrupt which impeded the closing of this estate and the actions of the trustee and his attorney in resisting the bankrupt's efforts to prevent payment of valid claims were indeed beneficial.

The bankrupt further asserts that the trustee's attorney should be denied fees because he took legal positions contrary to those taken by the bankrupt regarding validity of claims, settlements, etc. The bankrupt ignores completely the fact that in all major respects the positions taken by the trustee's attorney since his appointment in 1953 have been approved by this court.

Because of the complicated nature of these proceedings and of the Barrett law claims involved herein, the time and work necessarily involved in determining the extent of lien rights against the estate, and the difficulties caused the trustee by reason of the actions of the bankrupt which necessitated not only substantial litigation to assure that persons entitled to funds out of the estate receive those funds but also defense against personal attacks upon

himself, the trustee is entitled to receive the maximum fees permitted under the statutes, plus his expenses as shown in his petition. Since these proceedings commenced prior to 1956, the statutory maximum is $5205.75. His petition for compensation in excess of that maximum must be denied, there being no authority for granting such additional compensation.

In his petition, the trustee's attorney seeks an admittedly substantial allowance for fees. We know of no case, however, in which a substantial allowance is so well justified. The legal questions confronting him under the Barrett law concerning allocations of funds to lien claimants herein were fraught with difficulties at best.[16] Add to these the problems caused by the bankrupt, including eight appeals, three petitions for rehearing, two petitions for certiorari to the Supreme Court, charges of fraud, resistance of valid claims, etc., and it is apparent that the trustee's attorney was faced with and acquitted himself of a task of horrendous proportions. It is typical that the bankrupt, whose activities precipitated much if not most of the labor of the trustee's attorney, now objects that his petition is excessive and that his efforts were not beneficial. However, this court, with its knowledge of these proceedings, can unequivocally state that it was primarily through the work of the trustee's attorney, performed under unbelievably arduous and unpleasant conditions, that entitlement to assets in this estate was determined. Absent his efforts it is not inconceivable that the bankrupt would have succeeded in harassing and wearying lien claimants to the extent that it would acquire by default assets to which it had no right.

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[16] Counsel for the bankrupt himself, as our opinions with respect to Claim No. 441 and our opinion of September 23, 1963 reveal, was unable to understand or compute the extent of lien rights of claimants under the Barrett law.

Considering the time already spent and to be spent by the trustee's attorney as set forth in his petition, the nature and difficulty of the services performed and the obstructionism encountered, the result of his efforts, and the minimum fee schedules, it is our opinion that the $120,000 sought constitutes reasonable compensation for work done and to be done in this matter. We further hold that the trustee's attorney is entitled to the reimbursement sought for expenses, excepting $6000.00 for stenographic hire, and is entitled to reimbursement of amounts paid out for legal services in defending himself against the bankrupt's charges of fraud.

With respect to the bankrupt's objections to the fee petitions, like its objections to the supplemental final report, we note that the bankrupt considered itself entitled to a full scale evidentiary hearing. The fee petitions were in the proper form required by §62 of the Bankruptcy Act, and specified in detail the services performed and expenses incurred. General objections relating to the benefit to the estate and extent of performance of duties do not raise evidentiary issues. Those paragraphs of the objections stating the bankrupt's version of the history of these proceedings are not relevant to the matters before the court and are merely an attempt to obscure the real questions now before the court while ignoring the present status of these proceedings.

Counsel for the trustee will prepare orders pursuant to this opinion for submission to the court.

Dated, this 19th day of January, 1966.

/s/ Robert E. Tehan
U. S. District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No. [redacted]783

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,
Debtor,

* * * * *

CITY OF HAMMOND, INDIANA, a Municipal Corporation, ~~and WOODMAR REALTY COMPANY, an Indiana Corporation,~~
Petitioners,

vs.

WALTER A. McLEAN, TRUSTEE,
Respondent.

In Proceedings for the Reorganization of a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CITY OF HAMMOND, INDIANA, PETITIONER.

RESPONDENT'S BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No. 784

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,
Debtor,

* * * * *

CITY OF HAMMOND, INDIANA, a Municipal Corporation, and WOODMAR REALTY COMPANY, an Indiana Corporation,
Petitioners,

vs.

WALTER A. McLEAN, TRUSTEE,
Respondent.

In Proceedings for the Reorganization of a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
CITY OF HAMMOND, INDIANA, PETITIONER.

RESPONDENT'S BRIEF IN OPPOSITION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

On January 13, 1941, Woodmar Realty Company, one of the petitioners in this court, was placed in corporate reorganization under a Chapter X proceedings.

In February 1953 corporate reorganization was terminated and the matter was placed in bankruptcy in accordance with Section 236(2) of the Bankruptcy Act. In September 1955 Walter A. McLean, as trustee, filed a final report recommending the allowance and payment of approximately 313 claims all based upon special improvement bonds issued by the City of Hammond, Indiana, and constituting liens on the bankrupt's property.

Since that time the matter has been in constant litigation. Woodmar Realty Company, the bankrupt, has filed nine appeals to the Court of Appeals, numerous petitions for rehearing, and now three petitions for certiorari to this court.

As set out, in excess of 300 lien claims were filed in this bankruptcy. Until 1965 no lien claimant ever filed any objections to the proceedings. In other words, over the years since 1955 to 1965, no one other than Woodmar Realty Company had any objection to the proceedings in this administration.

In July 1965 the trustee in bankruptcy filed a Trustee's Supplemental Final Report alleging in substance that all of the bankrupt's property had been liquidated—that all of the pending claims had been acted upon—and that the time for appeal had passed—and that the bankruptcy matter,—after 26 years—was ready for closing. At that time the trustee and trustee's counsel filed petitions for allowances of fees and expenses, and the trustee asked for their determination, and that he then be authorized to make distribution to the lien claimants.

Hearing was set on such report and petitions for October 22, 1965.

The City of Hammond owns three lien claims on special assessment bonds in this matter and such claims constitute its only interest in this proceedings. All of the 300 lien claims, including these three owned by the City of Hammond, were allowed by separate court order in 1963 in specific amounts, and no appeal was ever taken by anyone from the allowance of such claims. The amount of the allowances of such claims, the date filed, and the number of such claims, is as follows:

Claim No. 261	Filed: 1941	$ 355.81
Claim No. 450	Filed: 1953	$1,903.12
Claim No. 507	Filed: 1953	$3,709.35
Total Allowance Fixed by Court Order		$5,968.28

These three claims were filed by the City of Hammond by Attorney Floyd Murray of Hammond, Indiana, and Attorney Murray represented this lien claimant throughout the entire pendency of the bankruptcy. During this time, the City of Hammond made no objection of any kind or nature throughout any aspect of the proceedings. This same monetary allowance was recommended to the court in the trustee's report filed in September 1955, and the City of Hammond, over the interim of ten years, made no objections to the bankruptcy administration or to the allowance of its claims.

The record shows that the recommended allocation of cash to all unpaid bonds and coupons in this bankruptcy is in the sum of $443,775.78—and that the City of Hammond's interest in the total amount of such cash allocations amounts to 1.3 0/0 of the total amount recommended.

On October 22, 1965, the City of Hammond filed objections to the trustee's supplemental final report and to

the trustee's fees, and to the petition for fees for trustee's counsel.

No other lien claimant—other than the bankrupt, Woodmar Realty Company—objected to the report or the fee petitions.

Peculiarly, the objections to the proceedings filed by the City of Hammond followed the same line as the objections formerly presented by the bankrupt. Although its three claims had been allowed in certain specific amounts, the City of Hammond urged that the claims were barred by the Statute of Limitations, that such claims were barred by reason of merger in judgment, and that such claims were improperly allowed in that they should have been each tried in open court as adversary proceedings.

Had the objections filed by the City of Hammond been sustained—the recovery by the City of Hammond necessarily would have not occurred.

On January 19, 1966, the District Court handed down an opinion denying the objections of the City of Hammond. Such opinion is attached to this petition as Appendix "C" at page 15-a, and on February 10, 1966, the District Court entered an order denying such objections, and such order is appended to the petition as Exhibit "B" at page 9-a.

The City of Hammond then appealed to the Court of Appeals and on June 22, 1967, the Court of Appeals affirmed the District Court.

The respondent respectfully submits that the City of Hammond—lien claimant—holding a 1.3 percent of the lien indebtedness herein involved, is not a bona fide litigant, but that it is, through its City Attorney—permitting itself to be used as a "stooge" for Woodmar Realty Company.

OPINIONS BELOW.

The Court of Appeals on June 22, 1967, affirmed the order of the District Court. A copy of the Court of Appeals opinion is set out at pages 1-a to 8-a, Appendix "A" attached to the petition.

The District Court order appealed from to the Court of Appeals is set out at Appendix "B" at page 9-a of the Appendix, and the District Court's opinion approving the Trustee's Supplemental Final Report and ordering distribution is set out in Appendix "C" at page 15-a of the Appendix.

JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed in this matter is dated June 22, 1967. On September 20, 1967, on the 90th day allowed by the court for the filing of a petition for certiorari, the City of Hammond filed as petition for an extension of time for the filing of such a petition. The petition for extension of time was granted and the time was extended to and including November 4, 1967. On November 4, 1967, the petition in this matter was filed.

Specifically, the court's jurisdiction is based upon 11 U.S.C. (Bankruptcy), Sec. 47(c), and 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

The petitioner alleges that the following questions are presented for review:

(1) Whether or not the Court of Appeals erred in approving the trustee's supplemental final report and in failing to require the lien claimants to prove their claims by the presentation of evidence at a proper hearing.

(2) Whether or not the Court of Appeals erred in failing to follow the requirements of Rule 52 of the Federal Rules of Civil Procedure.

(3) Whether or not the Court of Appeals erred in denying the City of Hammond's objections to the trustee's supplemental final report, etc., in approving the same, and in ordering payment of recommended "allocations" in favor of some 300 lien claimants, without pleading or proof.

(4) Whether or not the Court of Appeals erred in approving the trustee's supplemental final report as well as the trustee's fee petition and the trustee's counsel's fee petition at the hearing on October 22, 1965, since the City of Hammond, a creditor, did not receive notice of hearing as required by law.

(5) Whether or not the Court of Appeals erred in approving the fee petitions of the trustee and his counsel where the fee petitions failed to specify, in the detail required by law, the work allegedly performed by said fiduciaries.

(6) Whether or not the Court of Appeals erred in granting the fee petitions of the trustee and his counsel, where under the undisputed evidence in the record, many of the activities for which fees are sought were performed not for the benefit of the estate but for special interests adverse to the estate.

CONSTITUTIONAL RULES, PROVISIONS, ETC. INVOLVED.

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> Rule 56. Summary Judgment.
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended December 27, 1946, effective March 19, 1948.
>
> (b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (28 USCA, Rule 56, page 302)

Rule 16 of the Federal Rules of Civil Procedure provides in pertinent part:

> Rule 16. Pre-Trial Procedure; Formulating Issues.
>
> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

(28 USCA, Rule 16, page 591)

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for find-

ings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended December 27, 1946, effective March 19, 1948.

(28 USCA, Rule 52(a), p. 14)

CONCISE STATEMENT OF THE CASE.

I.

The Respondent respectfully points out that the petitioner in this matter, in setting out in his petition "A Concise Statement of the Case"—at pages 9 to 17, sets out a word for word copy of pages 5 to 14 of its brief as filed in the Court of Appeals; that likewise, the petitioner sets out as the remainder of its "Concise Statement of the Case" at pages 18 to 28 a word for word copy of pages 34 to 45 of its brief filed on the appeal to the Court of Appeals. The City of Hammond briefs filed in the Court of Appeals cause are a part of the record in this matter.

II.

In January 1941 an involuntary petition was filed under Chapter X of the Bankruptcy Act in the United States District Court for the Northern District of Indiana against Woodmar Realty Company. At that time Woodmar Realty Company was a dormant, inactive corporation. Its sole assets consisted of 1540 vacant lots and 12 unsubdivided blocks—all heavily encumbered with general property taxes, a bondholders' first mortgage,—long in arrears in the principal sum of about $300,000.00, and with long delinquent special improvement bonds under some 50 different City of Hammond special improvement loans (the total principal indebtedness on the special assessments was then approximately $477,000.00). No payment had been made on any of the indebtedness after 1930.

Upon the filing of a petition under Chapter X, it was first thought that corporate reorganization was possible

but in 1953, after extensive hearings in the District Court —the matter was placed in a straight bankruptcy proceedings, in accordance with Sec. 236(2) of the Bankruptcy Act.

During the proceedings in corporate reorganization, the trustee, acting under orders of court, sold all of the bankrupt's real estate "free and clear of encumbrances" so that all of the bankrupt's assets were in cash—and such cash proceeds were impressed with the liens of the unpaid special assessment rolls under some 50 different improvement resolutions.

Likewise, in the corporate reorganization proceedings and prior to 1953 the tax liability and the mortgage liability were eliminated by compromise so that the only indebtedness in the bankruptcy estate with the advent of straight bankruptcy in 1953 was the unpaid special assessment liens.

In the years to 1955—many claims were filed on the special assessment liens. In 1953 the District Court authorized the appointment of a certified public accountant for the making of an auditing study so that the net amount received from the sale of the bankrupt's real estate could be determined and so that such sum could then be properly apportioned to the lien indebtedness existing on the property sold.

In September 1955, the trustee filed a report with the court alleging that in his opinion there were 313 lien claims which should be allowed and the trustee further reported to the court that as a result of the study made by the auditors that the amounts due on each unpaid bond and coupon constituting a lien on the bankrupt's property had been established. At that time the trustee recom-

mended the allowance of such claims and the allocation of cash as determined by the auditing study to the different unpaid bonds and coupons.

The City of Hammond at that time owned three lien claims, and such claims, with the amount recommended for allowance by the trustee was as follows:

Claim No. 207	$ 355.81
Claim No. 450	1,903.12
Claim No. 507	3,709.35

This trustee's report was set for hearing and at that time Woodmar Realty Company then appeared and filed objections to about 274 out of the 313 pending lien claims. The record likewise shows that the Woodmar Realty Company filed objections to the three City of Hammond claims heretofore designated.

The objections filed to all of these claims by Woodmar Realty Company were virtually the same objections to each claim, and the objections thereto in each instance raised the same legal and factual problems and defenses. The trustee moved to strike out Woodmar's objections to claims on the theory that Woodmar was not a party in interest. Such motion was sustained by the District Court. An appeal was taken to the Court of Appeals and the District Court judgment was reversed on the theory that if Woodmar was successful in its objections to all lien claims—then it would be entitled to all of the funds in the bankruptcy—and ruled that Woodmar was a party in interest to object to claims.

Upon remand in the District Court, it was decided that a typical lien claim should be selected as a test case to be tried to determine rules of law "to cover all lien claims". The bankrupt had filed 15 objections to Claim

441 and this claim was selected as a "test claim". This "test case" was thereafter tried by the court and Woodmar's objections were held to be entirely without merit. The decision on Claim 441 was then affirmed on appeal.

After the decision on that test claim the trustee filed a motion for summary judgment seeking to apply the decision on the test claim to all of the other claims—and to the bankrupt's objections on such claims—the trustee contending in his motion that the remaining claims and the objections thereto raised the same legal and factual problem and that, in truth, there was no genuine issue of fact, and that the only remaining thing to be decided was a question of law.

Thereafter, on November 29, 1962, the District Court, in a pretrial order—required that Woodmar Realty Company file statements as to each claim, as to how and in what manner each of the remaining claims differed from the "test claim 441", and how and in what manner the bankrupt's objections to the remaining claims raised different evidentiary and legal issues. In the trustee's amended final report the trustee had set out and recommended an allowance on each bond and coupon and on each claim pending in the bankruptcy matter.

The pretrial order of November 29, 1962 likewise stated that on the trial of the "test claim 441" the court had established a formula and a procedure for the computation of the amounts due on the pending lien claims. Such order then required of the bankrupt that it should, as to each pending claim, compute the amount due on such claim using the formula established by the court—and then provided that if Woodmar failed to compute the amount due on the claims using such formula, then such

failure would constitute an admission that the amounts set forth by the trustee in his amended final report was correct.

Thereafter, the District Court judge, using the decision on the "test claim 441"—considered all of the remaining 304 lien claims in the light of the entire record, and in the further light of Woodmar's responses to the pretrial order—and then, after a study of each of the remaining claims, the court, in two long, detailed opinions and orders, on May 20, 1963, and on September 23, 1963—decided—that on the basis of the test claim and the responses—that in truth and fact the bankrupt's objections to all lien claims were without merit and that there was no undecided genuine issue of material facts remaining for decision—then, on the basis of other matters in the record, including the proof of the allocations of cash to each bond and coupon—held that the bankrupt's objections to all claims should be denied and that all such claims should be allowed in the amount recommended for allowance by the trustee. The opinion and order of the District Court of May 20, 1963, is found in the Appellant's Appendix in Cause No. 15694 and 15695, Court of Appeals, at pages 458-500, and such Appendix is now a part of the record in this court. Likewise, the District Court's opinion of September 23, 1963, is found in the Appellant's Appendix, Cause No. 15694 and 15695 of the Court of Appeals, at pages 500-556, and such Appendix is a part of the record in this court.

Thereafter, in 1953 all of the pending claims, including the three lien claims owned by the City of Hammond, were allowed by separate court order—and no appeal was ever taken from such orders. The three lien claims

of the City of Hammond were filed for such claimant by Attorney Floyd Murray of Hammond, Indiana. Throughout the pendency of this bankruptcy matter—the City of Hammond filed no objection to any aspect of such litigation and at no time appeared by any attorney other than Attorney Floyd Murray.

In July 1965 the Trustee filed his Supplemental Final Report alleging that the bankruptcy estate was completely administered; that all lien claims had been allowed; that the bankrupt's objections to all lien claims had been held to be without merit, and that there were no undisposed of claims or objections in the District Court, and then alleged that the matter was ready for closing.

The trustee and trustee's counsel filed petitions for allowances of fees and expenses. The matter was set for hearing on October 22, 1965. Hearing was had, and on January 19, 1966, the District Court handed down an opinion approving the trustee's supplemental final report and denying the objections of the City of Hammond and the objections of Woodmar Realty Company to both the report and the fee petitions. The District Court likewise determined the amount of the fee allowances and then ordered distribution. This opinion is found at Appendix "C" at page 15-a attached to the petition. On February 10, 1966, the District Court entered an order on such opinion and such order is found as Appendix "B" at page 9-a attached hereto. On June 22, 1967, the Court of Appeals entered an order affirming the District Court, and such order is attached to this petition as Appendix "A" at page 1-a.

ARGUMENT.

I.

The Respondent respectfully points out that the argument set out in the petition for certiorari by the City of Hammond, at pages 29 to 50, is a word for word duplication of the argument set out at pages 52 to 73 in the City of Hammond's brief on appeal to the Court of Appeals.

Such argument states nothing new and lists no reason for the granting of the petition. Such argument relates only to matters set out in the brief on appeal.

II.

In the first question presented for review—the petitioner, City of Hammond, asks whether the Court of Appeals erred in approving the Trustee's Supplemental Final Report and in failing to require the lien claimants to prove their claims at a proper hearing.

The City of Hammond is a lien claimant whose claim, like that of all other claimants, is based upon the ownership of special improvement bonds.

It is true that the Woodmar Realty Company, throughout the many years of the pendency of this litigation, has contended that each claim had to be tried separately in an adversary hearing, but the City of Hammond's lien claims were allowed in 1963—with other claims—and for the City of Hammond to now argue and contend that the allowance of such claims was in error is a ridiculous

argument against itself. This contention with other matters throughout its brief and in this petition once again shows that the City of Hammond is merely a "stooge" for Woodmar Realty Company.

The District Court in its opinion of September 23, 1963, discussed the contention repeatedly made by the bankrupt that it had the right to an adversary hearing on each claim and says as follows:

> "it contends that the Fifth Amendment to the United States Constitution entitles it to a hearing on each Class 2 claim "in open court, with the right to be faced by and cross examine witnesses, and the right, on the part of Woodmar Realty Company, to produce evidence." Of course, hearings are held, witnesses are examined and cross-examined, and evidence is produced where genuine issues of material fact exist and Woodmar, if it raised any genuine issue of material fact, would be entitled to a hearing. But by the same token an adversary party, under Rule 56, and the Court, under Rule 16, is entitled first to test whether the alleged issues of fact are in truth specious, frivolous and immaterial. The bankrupt cannot insist on a supposed right to a hearing on each of the remaining 134 Class 2 claims, if, as contended by the trustee in his motion for summary judgment, its objections to those claims are without merit as a matter of law and no genuine issue of material fact exists."

This portion of the court's opinion is found at page 512 in the Appellant's Appendix in Cause 15694 and 15695, which is now a part of the record in this matter.

III.

The second issue raised in the petition is the question whether or not the Court of Appeals erred in failing to follow the requirements of Rule 52 of the Federal Rules of Civil Procedure. Rule 52 relates to the necessity of making special findings of fact before entering judgments on claims.

The record in this proceedings shows that the adjudication on all of the claims other than Claim 441 (which was tried and on which there were special findings) were based upon a summary judgment. An examination of the District Court's opinions of May 20, 1963, and likewise September 23, 1963, show that the District Court determined that there was no genuine issue of material fact to be decided and so no special findings were required.

In the case of *A. R. Inc.* v. *Electro-Voice,* CCA 7th Cir. 1962, 311 F. 2d 508-513, the court says:

> "The making of Findings of Fact in granting a summary judgment would be illogical since they would carry an unwarranted implication that a fact question was presented."

It clearly appears that where there are no issues of fact to be decided by the court then special findings of fact are, of course, unnecessary.

The Respondent likewise respectfully points out that the last sentence of Rule 52 provides that special findings of fact are not necessary on decisions under the summary judgment Rule No. 56 and that this portion of the Rule reads as follows:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or

any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948." (28 U.S.C.A., Rule 52(a), p. 14)

IV.

The third question presented for review is as follows:

Whether or not the Court of Appeals erred in denying the City of Hammond's objections to the trustee's supplemental final report, etc., in approving the same, and in ordering payment of recommended "allocations" in favor of some 300 lien claimants, without pleading or proof.

The City of Hammond filed six objections to the trustee's supplemental Final Report. The first objection was that it had no notice of the hearing. The respondent will discuss this objection later on in the Argument.

The 2nd, 3rd, 4th and 5th objections presented matters previously raised by Woodmar Realty Company and previously denied by the court,—such as, the necessity that each claim had to be tried separately in adversary hearings,—such as, that the claims were barred by the statute of limitations, or that the claims were merged in judgment. These are strange arguments coming from a lien claimant whose only interest is in the ownership of three lien claims allowed more than two years before the filing of the objections.

The 6th objection filed by the City of Hammond was a vague statement of the existence of a supposed danger to the City of Hammond to come about from a distribution in the Woodmar bankruptcy. At the time of the hearing, the City of Hammond was unable to present its objections and the District Court judge then gave to the City

of Hammond ten days within which to file a memorandum setting out the substance of its objections. No memorandum was ever filed.

The City of Hammond's objections were discussed in the District Court's opinion of January 19, 1966, and such discussion is found in Appendix "C", page 16-a.

The record in the bankruptcy shows that an auditing study, made by a certified public accountant, employed under orders of court, was introduced in evidence in this matter showing a description of all of the unpaid special improvement bonds—constituting liens on the bankrupt's property—together with the balance due on each bond and coupon,—and that such auditing study likewise showed an allocation of cash to each unpaid bond and coupon, together with a proportionate share due each bond of the sales price of the real estate on which such bond represented a lien, a description of each bond and coupon—the unpaid balance thereon. The allocation of cash to each bond and coupon is likewise set out in great detail in the trustee's amended final report.

Any contention that the allocations of cash to claims was made by the District Court without proof is ridiculous.

V.

The fourth question presented for review by the City of Hammond in its petition is:

> Whether or not the Court of Appeals erred in approving the trustee's supplemental final report as well as the trustee's fee petition and the trustee's counsel's fee petition at the hearing on October 22,

1965, since the City of Hammond, a creditor, did not receive notice of the hearing as required by law.

The answer to this question is that the record shows that the City of Hammond, a credit, did receive notice of such hearing.

In 1941 the City of Hammond filed Claim 261 in this bankruptcy; in 1953 it filed Claims 450 and 507. All of such claims were filed by the attorney for the City of Hammond; Attorney Floyd Murray, of Hammond, Indiana. Throughout the years from 1941 to 1965 Attorney Floyd Murray represented the lien claimant and was its attorney of record. No one else ever represented the City of Hammond, and Attorney Floyd Murray was served with a notice of the creditor's meeting of October 22, 1965, and appeared at such meeting representing the City of Hammond.

On October 22, 1965, the city attorney and the assistant city attorney appeared in the bankruptcy matter for the City of Hammond for the first time and filed a motion for a continuance of the hearing, objections to the trustee's report, and objections to the fee petitions, and when called upon to present their objections, stated that they had not had time to familiarize themselves with the matter and asked for a continuance.

The District Court held that the record showed that the attorney of record for the City of Hammond, to-wit: Attorney Floyd Murray, had received notice of the hearing.

VI.

The fifth question assigned in the City of Hammond's petition for certiorari is as follows:

> Whether or not the Court of Appeals erred in approving the fee petitions of the trustee and his counsel where the fee petitions failed to specify, in the detail required by law, the work allegedly performed by said fiduciaries.

The work done by the trustee and trustee's counsel covered a period of more than 12 years from February 1953 to July 1965. Voluminous and detailed itemized statements of the time spent and expenses incurred were attached to each petition and the petitions were then verified. The District Court, in allowing the fee petitions, said in part as follows:

> "The fee petitions were in proper form as required by Sec. 62 of the Bankruptcy Act and specified in detail the services performed and the expenses incurred."

See Appendix "C", page 299.

VII.

The sixth question presented for review by the petitioner is as follows:

> Whether or not the Court of Appeals erred in granting the fee petitions of the trustee and his counsel, where under the undisputed evidence in the record, many of the activities for which fees are sought were performed not for the benefit of the estate but for special interests adverse to the estate.

This question presents a charge never previously suggested by the City of Hammond but repeatedly made by

Woodmar Realty Company as against the fiduciaries. The question is best answered by the opinion of the District Court found in Appendix "C" attached to the petition, particularly at pages 25-a to 29-a. The Court of Appeals did not err in any respect in approving the fee allowances to the trustee and trustee's counsel.

VIII.

The Decision of the Court of Appeals Is Clearly Correct And Such Decision Should Not Be Disturbed.

As has been pointed out, the City of Hammond is not a bona fide litigant in this matter. Likewise, as pointed out, the City of Hammond's only interest is that of a lien claimant,—owning three lien claims totaling 1.3 percent of the total lien indebtedness recommended for payment.

It is difficult to understand how and why a municipal corporation should permit itself to be used in this type of litigation—in an apparent effort to lead someone not familiar with this long pending matter—to believe that the City of Hammond is a disinterested claimant with a bona fide objection.

CONCLUSION.

The Respondent respectfully submits that a careful and detailed study of this entire petition fails to show any semblance of a reason why this petition for certiorari should be filed or why it should be granted.

The decision of the Court of Appeals passes upon many problems of bankruptcy administration in a matter that has been pending for many years, and in which there has

been much useless litigation—however, such decision does not in any way violate any established precedent or decision of this court or of any of the other courts of appeals. It clearly appears that there is no important legal question of federal law requiring decision by this court.

WHEREFORE, the Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No. 784

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,
Debtor,

* * * * * *

~~CITY OF HAMMOND, INDIANA, a Municipal Corporation,~~ and WOODMAR REALTY COMPANY, an Indiana Corporation,
Petitioners,

vs.

WALTER A. McLEAN, TRUSTEE, and HERSCHEL B. DAVIS,
Respondents.

} In Proceedings for the Reorganization of a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Opinions Of The Court Of Appeals And The District Court Are Appended.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No.

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,
Debtor,

* * * * *

CITY OF HAMMOND, INDIANA, a Municipal Corporation, and WOODMAR REALTY COMPANY, an Indiana Corporation,
Petitioners,

vs.

WALTER A. McLEAN, TRUSTEE, and HERSCHEL B. DAVIS,
Respondents.

In Proceedings for the Reorganization of a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Opinions Of The Court Of Appeals And The District Court Are Appended.)

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The decision of the Court of Appeals sought to be reviewed was rendered in the eighth appeal in a reorganization proceedings commenced by the filing of an involuntary petition under Chapter X of the Bankruptcy Act. The proceedings have been pending since January 13,

1941. On this date, four alleged holders of City of Hammond Special Improvement Bonds filed an involuntary petition seeking the corporate reorganization of petitioner Woodmar Realty Company, an Indiana corporation.

The Woodmar Realty Company, as debtor, appeared on January 24, 1941, and filed an answer consenting to reorganization under Chapter X. On January 24, 1941, the District Court, Honorable Thomas W. Slick presiding, entered an order classifying claims. Special assessment improvement bonds and coupons which represented purported lien rights upon the debtor's property were classified as "Class 2" claims. On November 22, 1941, an amended plan of reorganization was confirmed by the District Court and the Trustee was ordered to file objections to the "Class 2" claims. No objections to the "Class 2" claims were ever prepared or filed by the then Trustee, Charles L. Surprise, or his successor, respondent Walter A. McLean.

Because the Trustee had failed and refused to file objections to the "Class 2" claims as required by the order of November 22, 1941, the Woodmar Realty Company filed objections to the "Trustee's Final Report, etc." and separate objections to the 300 individual "Class 2" claims. Thereupon, the Trustee, Walter A. McLean, filed a Motion to Strike all the Separate Objections of the debtor to the Class 2 claims. He also filed a Motion to Strike the Debtor's Objections to his "Final Report, etc.". Certain of the Class 2 claimants filed Motions to Strike Out the Objections to their claims. All of the Motions to Strike, Dismiss and Expunge, were on the same general ground, to-wit: that the debtor and stockholders were not "parties in interest" and, consequently, had no standing or right to objection to either the lien claims or the "Trustee's

Final Report, etc.". All of the Motions to Strike were sustained on March 5, 1956. The order of the District Court was appealed to the Court of Appeals for the Seventh Circuit and reversed on February 27, 1957, the Court holding that Woodmar Realty Company was a "party in interest" and had a right to be heard on its objections. (*In the Matter of the Woodmar Realty Co.*, (1957) 241 F. 2d 768.)

On July 10, 1957, and again on July 16, 1957, the question of disposing of as many claims as possible through settlement was discussed with the Court. **The settlement suggestion emanated from the District Court,** and the Woodmar Realty Company acquiesced only on the basis that the Trustee and his counsel remain out of the settlement negotiations in the same manner as they were required to remain out of the contest of lien claims. On July 22nd, 1957, The Woodmar Realty Company filed a petition for authority to compromise Class 2 claims. On the same date, the District Court entered an order granting the petition and giving the Woodmar Realty Company authority to negotiate with the "Class 2" lien claimants. The Trustee was instructed to remain completely passive and neutral with respect to the settlement negotiations and the entire authority and responsibility for such negotiations was given to the Woodmar Realty Company.

On January 19, 1960, the District Court entered an order denying approval of the 102 settlement agreements with lien claimants and three compromise agreements with creditors. The order was followed by an opinion filed on February 11, 1960. (Appellants' Appendix, C.A. No. 13023, pages 55-76.) On Appeal, respondent Trustee alone opposed approval of the settlement agreements. The District Court's order was reversed on November 23, 1960, C. of A. No. 13023, 284 F. 2d 815.

Following remand, and on July 21, 1961, the District Court entered an order approving the 102 settlement stipulations with lien claimants and the 3 settlement stipulations with 3 of the 4 general creditors. The Trustee did not carry out the settlement stipulations as approved. Subsequently, and on April 28, 1964, the District Court entered an order and opinion vacating the Order of July 21, 1961, approving the settlement stipulations. Woodmar's appeal from the order of April 28, 1964, was dismissed on motion of the intervening Trustee, as respondent, on September 23, 1964, on the ground that petitioner Woodmar Realty Company was no longer a party in interest and lacked standing to appeal. (Order of September 23, 1964, in C. of A. Cause No. 14756.)

The Woodmar Realty Company made numerous efforts to have lien claims set down for hearing, and obtain the dismissal of abandoned claims. One lien claim, Claim No. 441, was heard on July 15th and 16th, 1957, at Lafayette, Indiana. The successor judge entered four (4) separate opinions on this lien claim over a period of three (3) years. On appeal, the judgment on lien Claim No. 441 was affirmed. *In the Matter of the Woodmar Realty Company* (1962), 307 F. 2d 591.

From 1962 through 1965, the District Court took various actions designed to project the decision on Claim No. 441 as constituting an adjudication in favor of all remaining lien claims. This was done under "pre-trial procedures" and a "motion for summary judgment". All lien claims, settled, abandoned, or otherwise, were caused to be allowed subject to the right given lien claimants to come in and prove up rights to additional monies.

The Trustee's Supplemental Final Report, etc. (Appellants' Appendix in Nos. 15694 & 15695, pp. 305-407, incl.), except for a historical resumé, and minor changes in proposed allocations, is the same as the petition filed on September 7, 1955. The trustee proposes to "allocate" $387,422.94 to the claims listed in Exhibit "A", $14,204.00 to the Class "B" list, and $42,148.84 into the Clerk's Office for owners of special improvement bonds and coupons, if any, who have never filed so-called lien claims. The cash on hand has increased from the $460,607.70 to $486,387.48. Therefore the net "unallocated" balance is reported as $42,611.70.

Each page of Exhibits "A" and "B" contains the statement: "Allocation of cash and payment subject to pro-rata deduction for administrative expense."

The Woodmar Realty Company's objections to the trustee's supplemental final report were noticed for hearing on October 22, 1965. The fee petitions of respondent trustee Walter A. McLean and the trustee's attorney, Herschel B. Davis, were noticed for hearing on the same day. No evidence was permitted on any of the issues formed.

On February 10, 1966, the District Court entered an order approving the supplemental final report and directing payment of the proposed "allocations". Simultaneously, respondents' fee petitions were approved and allowed.

The Court of Appeals for the Seventh Circuit affirmed on June 22, 1967.

OPINIONS BELOW.

The Court of Appeals rendered a cursory opinion set out as Appendix "A", page 1a, infra. It has not been published.

The order of the District Court appealed from is appended as Appendix "B", page 9a, infra, and the District Court's opinion is appended as Appendix "C", page 15a, infra.

GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS INVOKED.

The judgment sought to be reviewed is dated June 22, 1967, and was entered on the same day. Within 90 days therefrom, and upon petition filed under Rule 22, the time for filing the Petition for Certiorari was extended.

The order of the Honorable Court extending the time for filing the Petition for Certiorari was entered on September 22, 1967, and the time was extended through and including November 4, 1967.

This Court's general jurisdiction to review judgments of the Courts of Appeal in reorganization and bankruptcy cases is involved.

Specifically, the Court's jurisdiction is based upon 11 U.S.C. (Bankruptcy), § 47 (C), and 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether or not the Court of Appeals erred in approving the District Court's use of the "motion for summary judgment" concept as a means and method of avoiding any hearings on lien claims against the Woodmar Realty Company's assets.

(2) Whether or not the Court of Appeals erred in approving the District Court's abuse of discretion under Rule 16 of the Federal Rules of Civil Procedure in ordering the Woodmar Realty Company to file "statements in connection with lien claims".

(3) Whether or not the Court of Appeals erred in approving a form of trustee's report which prays for "allocations" in favor of lien claimants without regard to lack of proof of either the existence of the lien claims or the amounts, if any, which they may have coming out of the assets.

(4) Whether or not the Court of Appeals erred in approving the allowance of trustee's fees and trustee's attorney's fees in amounts approximating $130,000.00.

CONSTITUTIONAL RULES, PROVISIONS, ETC. INVOLVED.

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended December 27, 1946, effective March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

• • • • •

(28 USCA, Rule 56, page 302)

Rule 16 of the Federal Rules of Civil Procedure provides in pertinent part:

Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

(28 USCA, Rule 16, page 591)

Rule 52 (a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

"Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility

of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended December 27, 1946, effective March 19, 1948."

(28 USCA, Rule 52 (a), p. 14)

Burns' Indiana Statutes Annotated, § 2-620, provides as follows:

"No action shall be brought for the foreclosure of the lien of any assessment for streets, sewers, sidewalks, ditches and other public improvements, which is not commenced within five (5) years from the time the right of action accrues: provided, however, that where any such assessment shall be payable in installments, such action may be brought at any time within fifteen (15) years from the date of the final approval of such assessment as shown by the record creating and evidencing such lien."

Burns' Indiana Statutes, 1963 Replacement, Vol. 9, Part 1, § 48-2721, at p. 346, provides as follows:

"If the property shall sell for more than enough to pay the principal, interest, attorney's fees, costs and expenses, the surplus shall be paid to the property owner or party lawfully and rightfully entitled thereto."

Section 66 of the Bankruptcy Act, 11 USCA, § 106, provides in pertinent part as follows:

"§ 106. Unclaimed moneys

a. Dividends or other moneys which remain unclaimed for sixty days after the final dividend has

been declared and distributed shall be paid by the trustee into the court of bankruptcy; and at the same time the trustee shall file with the clerk a list of the names and post-office addresses, as far as known, of the persons entitled thereto, showing the respective amounts payable to them.

b. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That, in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends. July 1, 1898, c. 541, § 66, 30 Stat. 564; June 22, 1938, c. 575, § 1, 52 Stat. 875."

CONCISE STATEMENT OF THE CASE.

The assets of petitioner Woodmar Realty Company have been in custodia legia for twenty-five years. The majority of the 42 stockholders who consented to reorganization in the District Court have died, pendente lite, and their stock certificates transferred, from time to time, to their heirs. The President of the Woodmar Realty Company, Roscoe E. Woods, died on the witness stand in these proceedings on May 29, 1951. His widow, Helen M. Woods, who succeeded him as president, is now seventy-eight years old. Other elderly stockholders are still alive.

In the first ten years that proceedings were pending, the Woodmar Realty Company's real estate, Hammond's finest subdivision, was liquidated by the managing trustee, Charles L. Surprise, who, along with other court appointed fiduciaries, was buying up pre-depression, long defaulted City of Hammond Special Improvement Bonds,

at a few cents on the dollar. (See findings and opinion of the District Court under date of October 29, 1952, Supplemental Transcript of Record in cause No. 11783, pages 28 through 49, inclusive.)

The net cash assets, now $486,000.00, the Woodmar Realty Company successfully fought to preserve in 1951 against $287,000.00 in fiduciary fee claims and delivery of the balance to the Lake County Treasurer, acting ex officio for the City of Hammond. (See Supplemental Transcript of Record in Cause No. 11783, and order of the District Court entered on December 3, 1952, Transcript of Record in 11783, pages 193-198, inclusive.)

Since the commencement of the hearings on the fiduciaries' fee petition and the "Alternative Plan of Distribution" on April 16, 1951 (in which the Woodmar Realty Company stood alone and was successful), its counsel has been the subject of castigation, increasing in intensity as the proceedings have continued without termination.

In the first opinion of the District Court on settlements, mimeographed and mailed to all lien claimants and their counsel, in February of 1960, the conduct of Woodmar's attorney was characterized as "appalling", "reprehensible", intended to "frighten and discourage claimants from asserting their rights" and "arrogantly" calculated to deceive. (Appellant's Appendix in 13023, pages 55-76, inclusive.) Failure to terminate the proceedings is attributed solely to the Woodmar Realty Company's counsel in subsequent opinions.

Yet, the length that these proceedings have been pending is something that the Woodmar Realty Company could neither control nor influence. The trustees and their counsel are solely responsible for this situation.

There is and has been no change of circumstances since May 23, 1950 when respondent Herschel B. Davis was appointed trustee's attorney.

The same fund is on hand. The lien claimants have yet to receive a penny. The trustee's program to appropriate the cash assets as fees remains in the same position as it was in 1951. The "Trustee's Final Report; etc." is the same document, with a different title, as the trustee's "Alternative Plan of Distribution", rejected, following prolonged hearings, by the District Court's order of December 3, 1952.

The improvement bonds were not and are not the contractural obligations of the Woodmar Realty Company, but originally represented alleged statutory lien rights in its land (and other lands). When the land of the Woodmar Realty Company was sold by the Trustee, free and clear of the liens, the liens, if any, represented by the outstanding municipal bonds were transferred to the proceeds of the sale. The trustee commingled the proceeds of the sales.

During the 26 years that these proceedings have been pending, approximately 300 separate Class 2 claims had been filed by the alleged owners and/or holders of various defaulted City of Hammond special improvement bonds issued prior to 1930. On November 22, 1941, the District Court ordered Trustee Surprise to file objections to the "Class 2" claims and cause hearings to be had on the issues thus formed. No objections to the "Class 2" claims were ever prepared or filed by the then Trustee, Charles L. Surprise, or his successor, respondent Walter A. McLean, Trustee, or any hearings had thereon.

Trustee Surprise, his then attorney, and other fiduciaries, secretly and pendente lite, purchased, either direct-

ly or indirectly, large numbers of the defaulted municipal improvement bonds which they then attempted to recover on from the cash assets in the possession of Trustee Surprise.

In April of 1951, the Woodmar Realty Company filed extensive objections and other pleadings in opposition to the distribution program of Trustee Surprise and the petitions of the fiduciaries seeking an allowance of $296,000 in fees out of the then net $491,988.56 cash balance. None of the fiduciaries objected to either the distribution plan or the fee petitions of each other. Following prolonged hearings, and on October 29, 1952, **the District Court ruled in favor of the Debtor, the Woodmar Realty Company.**

Instead of filing objections to the Class 2 claims, and on September 7, 1955, the present Trustee, Walter A. McLean, filed a document entitled "Trustee's Final Report; Petition For the Determination of Amounts Due on Special Assessment Bonds and Coupons Constituting Secured Claims as Against Funds in This Matter and For an Order Directing Payment Thereof, Etc." Thereupon, the Debtor, Woodmar Realty Company filed written objections to the Trustee's Final Report, etc." and, with leave granted by the District Court, filed 274 separate sets of objections to 274 out of the 300 odd claims. (Subsequently, objections were filed to the remaining Class 2 claims.) **The issues formed on "The Amended Trustee's Final Report, etc." have not been determined.**

Respondent trustee, Walter A. McLean, and certain of the lien claimants filed motions to strike out the Woodmar Realty Company's objections on the ground that the Woodmar Realty Company was not a "party in interest". The District Court's order sustaining the motions was re-

versed on appeal to the Court of Appeals for the Seventh Circuit. *In the Matter of Woodmar Realty Company, Debtor* (1957), 241 F. 2d 768. A motion to dismiss, identical to the motion granted by the Court of Appeals on September 23, 1964, was denied, the Court of Appeals stating, in pertinent part, as follows:

> "The bankrupt has been permitted to object to allowance of claims in cases where in the event of disallowance there would be a surplus left for the bankrupt. *In re Povill*, 2 Cir., 105 F. 2d 157; *In re Hopkins*, D.C.R.I., 15 F. 2d 206 (on petition to review); cf., *In re Witherbee*, 1 Cir., 202 F. 896. The bankrupt here has brought itself within this exception to the general rule. The bankrupt's interest in having claims in excess of $300,000 disallowed, in which event a substantial surplus would be available for the bankrupt, is obviously real, and the conclusion is inescapable that under these circumstances the bankrupt is a 'party in interest'." (241 F. 2d 768, page 771)

On remand, one of the lien claims, Claim No. 441, was set down for trial. The Trustee neither filed pleadings nor did he attend the trial. Claim No. 441 and the Woodmar Realty Company's objections thereto, tried in July of 1957, is the only claim ever tried. The District Court handed down findings 4 years later, in 1961.

At the suggestion of the then Judge of the District Court, the Woodmar Realty Company filed a petition for authority to negotiate settlements. An order was entered on July 22, 1957, granting the Woodmar Realty Company and special improvement bondholders authority to enter into compromise negotiations, any compromise agreements to be subject to the approval of the court. This order was reconfirmed on August 30, 1957.

Pursuant to the orders so entered, the Woodmar Realty Company entered into settlement stipulations, filed of record, with 102 lien claimants. The Trustee filed a petition for instructions in connection therewith. Hearings were held in 1958 on the question of approval of the 102 settlement stipulations. Written notice was given all parties of record. No objections to the approval of the 102 settlement stipulations were filed or made. Notwithstanding the lack of objections, the District Judge, on January 16, 1960, entered an order denying approval of the 102 settlement stipulations. The Woodmar Realty Company, Debtor, appealed from this order. The order was reversed. *In re Woodmar Realty Company* (1960) 284 F. 2d 815. The Court of Appeals established the law of the case, in pertinent part, as follows:

> "The balance of this depleted fund would become the property of Woodmar. The more that was allowed the lien claimants, the less Woodmar would recover from its property. **The less that the claimants would receive, the more Woodmar would recover.**"
>
> • • • • •
>
> **"The pending litigation was in reality between Woodmar and the lien holders. Whether it was litigated to a finish or settled, they were the ones who would ultimately be affected thereby.** Such litigation was really an ordinary civil controversy. The parties, whether in litigating in the courtroom or in settling outside the courtroom, were engaged in an adversary activity and dealing at arms' length." (284 F. 2d 815, page 817)

Following remand, and on July 21, 1961, the District Court entered an order approving the 102 settlement stipulations. Notwithstanding the fact that the settlement stipulations so approved expressly provided for the dismissal of

the claim and immediate disbursement of the proceeds of the settlement to each of the 102 lien claimants, the Trustee failed and refused to carry out the settlement stipulations.

On September 6, 1962, 3 out of 102 lien claimants who had settled, served and filed a "Petition to Re-docket Three Claims." Following notice to the Woodmar Realty Company and oral argument held on February 28, 1964, the District Court, on April 28, 1964, entered orders with opinions vacating the 102 settlement stipulations and ordering the Trustee to reimburse Gardner and Phrommer for their appeal costs. The opinions and orders are printed in the appendix, infra.

Shortly after the Court of Appeals rendered its opinion affirming the District Court's order dismissing the Woodmar Realty Company's amended removal petition (Cause No. 13215, June 23, 1961) and on July 31, 1961 respondent trustee McLean, by his counsel, Herschel B. Davis, filed a "Motion for Summary Judgment" alleging as follows:

> "1. That Claim 441 filed in this matter was tried as a 'test case' or 'pilot claim' to determine the law as to the validity of Bankrupt's objections to all Class 2 claims.
>
> "2. That the record in this case and the court's decision on Claim 441 decided in effect that the objections filed by the Bankrupt to Class 2 claims are entirely without merit.
>
> "3. That there are no valid objections to any Class 2 claims.
>
> "4. That the Bankrupt is not a party in interest in this proceeding and has no standing herein."

Significantly, the 102 lien claims ordered approved by the Court of Appeals, were completely omitted from the

list of claims upon which summary judgment was sought; no summary judgment was asked on the 102 lien claims that were settled. On August 11, 1961, the Woodmar Realty Company served and filed its motion to strike and expunge the "Motion for Summary Judgment" on the ground that (a) neither notice nor motion was served on any of the lien claimants, (b) the "Motion for Summary Judgment" was filed in violation of the orders and mandates of the Court of Appeals in cause No. 11783 (241 F. 2d 768) and No. 13023, (284 F. 2d 815) (c) trustee McLean and the trustee's attorney, Herschel B. Davis were without power or authority, by their own admissions, and under the law of the case, to represent lien claimants in proceedings against the trust assets, and (d) the particular motion designated as a "Motion for Summary Judgment" is both unknown and unauthorized under the federal rules of civil procedure and particularly Rule 56.

Pursuant to court order, and on October 9, 1961 the Woodmar Realty Company filed its "counter-affidavit" in opposition to the recitation of the record filed by Herschel B. Davis on or about July 31, 1961 (by this affidavit, the Woodmar Realty Company denied in detail erroneous representations of fact made by the trustee's attorney, and under oath, stated facts to the contrary).

On November 28, 1962, the District Court denied the Woodmar Realty Company's motion to strike and expunge and, over objection of the Woodmar Realty Company, entered the following order:

> "It Is Therefore Ordered that with respect to each claim to which the bankrupt has objected and which has not been settled by agreement approved by this court, the bankrupt shall file a statement containing

the following information, not later than January 11, 1963:

"A. If objections have been filed based upon the statutes of limitations, the bankrupt will set forth:

"1. The date on which it claims that the statutes of limitations it cites expired.

"2. The date on which it claims that the final resolution involved was adopted.

"3. The date on which it claims that the bonds involved matured.

"4. Whether any state court foreclosure action was commenced on the roll involved and if so the date of its commencement.

"B. If objections have been filed claiming that the claim or any portion thereof was merged in a final judgment in a state court foreclosure action, the bankrupt will state:

"1. The date on which the final judgment was entered.

"2. Whether the judgment by its terms affected Woodmar property.

"3. Whether any property owned by Woodmar on the date of commencement of these proceedings is claimed by the bankrupt to have been sold in the state court action. If so, what property.

"4. Whether the bankrupt claims that the state foreclosure action was commenced after the expiration of any statute of limitations applicable. If so, the statute will be specified, and the date it is claimed to have expired will be set forth.

"C. If the bankrupt contends that any other matter connected with its objections but not set forth in A and B differentiates the claim from Claim No. 441, it will set forth such matter with specificity, describing wherein it differs from Claim No. 441.

"D. In its opinion of July 21, 1961, the court has described the proper method of computing the amount due on bonds out of this estate. Using such method, the bankrupt will state, as to each claim, the amount

it believes should be recovered by the claimant if the claim is held to be valid.

"It Is Further Ordered that the trustee will file such response to each statement as he desires not lated than January 18, 1963.

"It is Further Ordered that if the bankrupt fails to furnish the information required in A, B and C above as directed, it will be deemed to have admitted, with respect to each claim where such failure occurs, that the claim is valid under the law as established in Claim No. 441, and cannot be differentiated from that claim. If it fails to furnish the information required in D above, as directed, as to any claim, it will be deemed to have admitted that the trustee has properly arrived at the amount of that claim in his amended final report.

"Dated, this 29th day of November, 1962." (Appendix in 15694 & 15695 page 488)

Over objection and expressly reserving its rights, the Woodmar Realty Company, by its counsel, prepared, served and filed 132 separate factual statements in connection with 132 of the 300 special assessment bonds or lien claims. It was not required to file separate factual statements with regard to the 102 settlement stipulations ordered approved by the Court of Appeals. It did not file factual statements with reference to the 33 patently abandoned claims. Nor did it file separate factual statements with reference to 11 lien claims which the Woodmar Realty Company had settled, but which settlements had not yet been approved.

On May 20, 1962, without further hearing or proof, the District Court filed an opinion followed by an order directing respondent trustee to prepare and file orders allowing 49 claims in the amounts "allocated" in the amended trustee's final report, etc. filed on September 7, 1966.

(Appellant's Appendix in 15694 and 15695, pages 458-501) A similar and further "opinion" was filed by the District Court on September 23, 1963 directing the trustee to file orders allowing an additional 132 class 2 claims in the amount allocated thereto in the amended final report. (Appendix in 15694 and 15695, pages 501 to 557.)

On the same date, and without issues, hearing, or proof, the District Court made the following declaration:

> "For the reasons set forth in the court's Opinion of September 23, 1963,
>
> "It Is Ordered: That the bankrupt, Woodmar Realty Company, is not a party in interest within the meaning of Sec. 57(d) of the Bankruptcy Act, and has no standing as such in these proceedings." (Appellant's Appendix in Cause Nos. 15694 & 15695, page 557.)

ARGUMENT.

I.

THE TRUSTEE'S MOTION FOR SUMMARY JUDGMENT, BEING UNAUTHORIZED BY EITHER THE FEDERAL RULES OR LEGAL PRECEDENT, SHOULD HAVE BEEN EITHER STRICKEN OR DENIED.

The order of February 10, 1966, ordering payment of listed lien claims as set out in Exhibits "A", "B", and "C" to the Trustee's Supplemental Final Report, is predicated, in the main, upon the granting of the Trustee's Motion for Summary Judgment. (The Trustee did not seek summary judgment on 102 out of 300 lien claims approved pursuant to the mandate and opinion of the Court of Appeals in Cause No. 13032, 284 F. 2d 815.) The law of the case, the Federal Rules, and established precedents require either the striking of the Trustee's motion or the denial of it.

A.

The Trustee's Motion Should Have Been Stricken From The Record, for Rule 56 Explicitly States Who May Move for a Summary Judgment, and the Trustee, McLean, is Not An Authorized Party.

Rule 56 explicitly lists all the necessary requirements for a proper motion, including who may move for a summary judgment. Section (a) of Rule 56 reads:

> "(a) *For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may,* at any time after the expiration of 20 days from the commencement of the action or after service of a motion for sum-

mary judgment by the adverse party, *move* with or without supporting affidavits *for a summary judgment in his favor* upon all or any part thereof.

Section (b) reads:

"(b) *For Defendant Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may,* at any time, *move* with or without supporting affidavits *for a summary judgment in his favor* as to all or any part thereof."

It is obviously clear, from the above sections, that Rule 56 does not contemplate or authorize a motion for summary judgment by a "non-party" to an adversary proceeding. In fact, the Rule's authorization of a motion by *either* the claimant or the defendant was itself a unique innovation in American Jurisprudence. Although many states have provided for a summary judgment procedure, it is usually available only to claimants, not to both parties alike. As stated by the Court of Appeals of the Second Circuit in *England* v. *Aetna Life Insurance Co.* (1943), 139 F. 2d 469:

"The federal summary judgment proceeding is the most extensive of any jurisdiction in that it is equally available to plaintiffs and defendants * * *" (At p. 472)

How then can the Trustee's motion for summary judgment be predicated upon a rule which clearly and reasonably[1] limits such a motion to either a claimant or

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[1] Otherwise, it appears as though a final judgment, with a res judicata effect, could be entered against an actual party, either claimant or defendant, without his having a chance to protect his interests. For it is usually

defendant and which, even with this limitation, is almost unique in its liberality! By his own admission, the Trustee is *not* a party to these proceedings. Quoting from the Trustee's "Notice to Creditors of Woodmar Realty Company":

> "The effect of the decision on the United States Circuit Court of Appeals is to require a decision on the objections to each of the 275 claims objected to. Many of the creditors have counsel representing them in this litigation and who have appeared for their clients in the trial court. Many other claimants have not employed counsel to represent them. *You are advised that the Trustee and his counsel cannot represent the claimants in the trial of the objections to their claims.* You are advised as to the present status of this matter so that you may take any action in regard to this claim that you believe advisable." (Appendix in 13032, page 39)

Thus, by decision of the Court of Appeals (241 F. 2d 768) as well as by his own admission, the Trustee is not a party to the present proceedings and, hence, not authorized by Rule 56 to move for a summary judgment. Such an anomaly as the Trustee's motion should have been forthrightly stricken and expunged from the record of these proceedings.

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held that since the purpose of this procedure is to expedite the disposition of cases, a summary judgment may be rendered against the party moving for judgment and in favor of the opposing party although the latter has never made any cross-motion for judgment. 3 Moore, *Federal Practice*, §56.02; 3 *Barron and Holtzoff, Federal Practice and Procedure*, §1239, pp. 178-179; *Hooker* v. *New York Life Ins. Co.* (D.C. N.D. Illinois 1946), 66 F. Supp. 313.

B.

The Trustee's Motion Should Have Been Stricken From The Record For, on its Face, it Neither Seeks a Judgment Upon a Whole Claim nor an Order Specifying the Uncontroverted Material Facts.

The District Court should, for a second reason, have stricken the Trustee's motion from the record, for, on its face, it neither seeks a final judgment upon a whole claim (or claims) nor does it seek an order specifying the uncontroverted material facts.

It is evident that the Trustee's motion is not predicated upon 56(a), for as pointed out by the Advisory Committee's note, "Rule 54(a) defines 'judgment' [as used in section (a)] as including a decree and 'any order from which an appeal lies.'" Obviously, the Trustee's motion is not seeking a final, appealable order, for it is not seeking a judgment upon any whole claim(s). Rather it seems to ask for what can only be characterized as a combination of an order establishing "conclusions of law" and a judicial pronouncement of the existence of certain "principles".

It is equally clear that such a motion can no more be based on 56(d) than it could on 56(a). The courts have been consistent in their interpretation of the interrelation of sub-sections (a) and (d). In *Biggins* v. *Oltmer Iron Works* (1946), 154 F. 2d 214, the Court of Appeals for the Seventh Circuit was faced with a situation in which the plaintiff moved for and the District Court granted what was designated as a "partial summary judgment." We quote extensively from the Court's opinion to show its construction of the interrelation of sub-sections (a) and (d):

"Of the numerous paragraphs contained in Rule 56, only (a) and (d) are material to the instant situation. Paragraph (a) provides:

> 'A party seeking to recover upon a claim, counterclaim, or cross-claim * * * may, at any time after the pleading in answer thereto has been served, move * * * for a summary judgment in his favor upon all or any part thereof.'

"True, this paragraph standing alone indicates that a plaintiff may be awarded a summary judgment for a 'part' of the claim sued upon. This paragraph, however, when a summary judgment is sought by plaintiff for only a part of his claim must be construed in connection with paragraph (d) entitled, 'Case Not Fully Adjudicated on Motion.' It provides:

> 'If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion * * * shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.'

"The language just quoted is controlling in the instant situation where judgment was neither sought nor rendered 'upon the whole case or for all the relief asked.' When such a situation is presented to a court, is it authorized to enter a partial summary judgment as was done in the instant case? Paragraph (d) plainly answers this question in the negative. It continues:

> 'It (the court) shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.'

"In other words, interpreting paragraph (d) as a whole, it appears plain that a summary judgment is not contemplated or authorized for any portion of a claim less than the whole. *When the court is confronted with such a motion as it was in the instant case, it is authorized only to make an 'order' as to the non-controverted facts.* * * *" (At pp. 216-217; emphasis added)

Hence, it is clear from the above that where a summary judgment is not sought upon the whole case—as was the situation here—the District Court is only authorized by 56(d) to issue an order of the non-controverted facts, no more and no less.

This same conclusion has been also reached by other Circuits. In *Parmelee* v. *Chicago Eye Shield Co.* (8th Cir. 1946) 157 F. 2d 582, the court stated:

"On such a motion, if judgment is not rendered on the whole case and issues must be tried, the court should specify the *facts* which appear without substantial controversy and proceed with the trial as to the facts which remain in dispute. * * *" (At p. 585; emphasis added)

In *Associates Discount Corporation* v. *Crow* (D.C. Cir. 1940), 110 F. 2d 126, the Court said:

"[W]here 'material facts are actually and in good faith controverted' the court 'shall * * * *make an order specifying the facts that appear without substantial controversy*' and direct 'such further proceedings in the action as are just.' It was therefore the duty of the trial court in the instant case to specify in a finding the facts that appeared from the pleadings without substantial controversy, and to go forward with the trial in respect to those which remained in dispute." (At p. 128; emphasis added.)

See to the same effect: *Coffman* v. *Federal Laboratories, Inc., et al.* (3rd Cir. 1948), 171 F. 2d 96; *Andi-Vision, Inc.* v. *RCA Mfg. Co.* (2nd Cir. 1943), 136 F. 2d 621.

The foremost authority on Federal Civil Procedure, Professor Moore, in his treatise on the Federal Rules (3 Moore's Federal Practice, 1938, 3175) states:

> "Rule 56(d) imposes a duty upon the court to sift the issues and to specify which *material facts* are really in issue and which are not, thereby facilitating and expediting the trial."

C.

The Trustee's Motion For Summary Judgment Was Filed In Violation of The Mandates of The Court of Appeals In Two Prior Appeals and In Violation of The Trustee's Duty To Defend The Estate.

When the Motion for Summary Judgment was filed on July 31, 1966, the District Court had before it the mandates and opinions in two (2) earlier appeals declaring that the Woodmar Realty Company was a party in interest and the true adversary of the lien claimants with the right to litigate or settle. The District Court, on June 10, 1957, at the pre-trial on 441, had determined that the burden of proof was upon the lien claimants. Regarding the lien claimants as adversaries of the trust estate, as established by the law of the case, it was the Trustee's duty to defend the estate, if he participated at all. All examined precedents disclose that, wherever the trustee has participated in adversary proceedings to establish a lien, the trustee has appeared on behalf of the estate against the third party lien claimant. (See **Collier on Bankruptcy**, 14th Ed., Vol. 3, VIII, Practice, para. 64-701. **Procedural requirements**: Filing claim to priority, p. 2246, and precedents cited therein.) Where a trustee

has taken possession of and sold property subject to an alleged lien, the lienor, himself, prosecutes his claim against the trustee. 8 C.J.S., Bankruptcy, para. 261, p. 924, "Remedies to Establish and Enforce Rights and Liens". The state law controls and is enforced by the Federal Court. 8 C.J.S., para. 262, p. 934. See also "Sale Free of Liens", 8 C.J.S., para 322(b), p. 1059, et seq. *Valid* lien claims are entitled to priority and payment. 8 C.J.S., para. 453, p. 1327.

As stated in the case of *In re*: *San Joaquin Valley Packing Co.*, (C.C.A. 9, 1924), 295 F. 311, at pages 313-14:

> "The respondent's lien on the building was not affected by the bankruptcy. The Trustee's relation to the property was the same as that of the owner prior to bankruptcy. He stood in the bankrupt's shoes, so far as the question here presented is concerned. It is only with relation to certain additional powers, conferred by special provisions of the act and not involved here, that the trustee's relationship to the property differs from that of the prior owner. Both the trustee and the respondent had an insurable interest in the building. The trustee was under no greater obligation to protect the lien of the respondent than had been the owner prior to bankruptcy. *The trustee was not trustee for fully secured lien claimants. He was trustee for the bankrupt and the unsecured creditors.* In bankruptcy proceedings these two classes of creditors stand upon widely different footing. The fully secured lien claimant has no voice in the selection of a trustee and is not entitled to vote at creditors meetings." (Italics ours)

The Trustee is under a duty to oppose such adverse lien claims and to defend the estate against them. As stated in the case of *In re*: *National Boat & Engine Co.* (D.C. Maine, 1914) 216 F. 208, at page 211:

"In pursuance of this general doctrine of the Federal Courts, it has been repeatedly held that a fund derived from the sale of property free of liens will stand as a substitute for the property sold, and will be held by the trustee for the benefit of those holding bona fide claims and liens to the extent their respective interests may appear; as a consequence of the power to order a sale free of liens, the court has jurisdiction to determine the extent and validity, and the relative priority of claims of lien holders to the proceeds. The court should also make provision for protection of the rights of the several lien creditors in the fund derived from the sale, in order that such creditors may prosecute their claims to a preference against the fund; *and it follows that the trustee in bankruptcy should appear and protect the rights of the estate in proceedings for the distribution of the fund derived from such sale.* * * * *It is the duty of the trustee to appear and protect the fund in the custody of the court.*" (Italics ours)

In the case of *In re: Cook* (D.C. Mass., 1928), 28 F. 2d 521, it is said:

"It is the rare instance in which the estate is sufficient to pay all claims and all charges against it and where there is likely to be a surplus, *it is the trustee's duty to protect the interests of the bankrupt in the surplus.*" (Italics ours)

This rule is also well stated in 8 *C.J.S., Bankruptcy,* par. 296, page 1020:

"It is his duty also to protect the estate against excessive charges for administrative expenses, and where the estate is sufficient to pay all claims and charges against it, and there is likely to be a surplus, *it is his duty to protect the bankrupt's interest in the surplus.*" (Italics ours)

D.

The Law Prohibits A Trustee's Attorney From Representing Both Sides In An Adversary Proceeding.

In filing and presenting the Motion for Summary Judgment, respondent Herschel B. Davis was acting in violation of one of the most elementary concepts of an attorney's duties—to avoid representing conflicting interests.

He could not represent the cash assets in the estate and the lien claimants against the cash assets at the same time.

As stated in *In re*: *Sun Building & Loan Association of Newark* v. *Rashkes,* (N.J., 1936) 183 A. 270:

> "An attorney cannot act on behalf of two opposing parties; and even though he may act for two parties in matters which are uncontested, his conduct is open to the most careful scrutiny. He is obliged to exhibit the most perfect good faith. He cannot prejudice one client for the benefit of another. **A scriptural passage which succinctly expresses the principles under consideration is found in Matt. vi, 24-33, as follows: 'No man can serve two masters; for either he will hate one, and love the other, or he will cling to one, and slight the other. Ye cannot serve God and mammon.'** "

Likewise, in *Gilliam* v. *Saunders, et al.,* (1903), 204 N.C. 206, 167 S.E. 799, the Court stated:

> " 'Yet the law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably; and in general will not permit a judgment or decree so affected to stand if made the subject of exception in due time by the parties injured thereby. The presumption, in such cases, is that the party was unduly influenced by that relation, and that the opposite party cannot take the benefit of it. It does not appear affirmatively in this case that Mrs.

Moore, the defendant, was not influenced to her prejudice and thrown off her guard thereby. The purity and fairness of all judicial proceedings should so appear when drawn in question.' *Molyneux* v. *Huey*, 81 N.C. 106; *Patrick* v. *Bryan*, 202 N.C. 62, 162 S.E. 207.

Moreover, the unamendable mandate of both law and morals forbids an attorney in the homely phrase of the fields, 'to run with the rabbits and bark with the hounds'.''

II.

THE DISTRICT COURT'S ORDER OF NOVEMBER 28, 1962, REQUIRING THE WOODMAR REALTY COMPANY TO FILE "STATEMENTS", CONSTITUTED AN ABUSE OF DISCRETION UNDER RULE 16 OF THE FEDERAL RULES.

After the return of this Court's mandate in No. 11783, and on June 28, 1957, the Woodmar Realty Company, by its counsel, attended a regularly noticed and scheduled pre-trial conference in Lafayette. Thereafter, and on notice, it attended a pre-trial conference in Lafayette on July 10, 1957. Woodmar attended a further pre-trial conference in the District Court in Hammond on January 29th and 30th, 1958. The parties were again in Court, on notice, on February 11th and 12th, 1960. It appeared at a further pre-trial conference on April 26, 1960. It was noticed in again for pre-trial on August 22, 1961. On November 7, 1962, an order was entered, not for a further "pre-trial" but for a hearing on the Woodmar Realty Company's motion to strike and expunge the Motion for Summary Judgment and the Trustee's Motion for Leave to Amend his Motion for Summary Judgment. The parties were not advised that a pre-trial conference was going to be held on November 27, 1962. Yet, the order requiring the Woodmar Realty Company to furnish statements was entered on the following statement by the District Court:

> "I have here what I propose as the embodiment of an order to follow the hearing here, and under my powers by virtue of Rule 16 of the Federal Rules of Civil Procedure, I believe that the court has the power to exact of the parties all of the material that is available to make a determination as to whether or not there are any genuine issues of material fact." (Transcript of Proceedings of November 27, 1962, page 36.)

The order is set forth in full at pages 18 through 20, supra, of this Brief and is incorporated herein by reference.

Rule 16 provides:

> "In any action, the Court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider, etc."

Yet, the parties were not directed to appear for a conference.

Nor did the parties confer on any of the listed subjects under Rule 16:

"(1) The simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(6) Such other matters as may aid in the disposition of the action."

The order entered does not embody any "action taken at the conference" or any other item of business lawfully authorized under Rule 16.

Rule 16 does not confer on the District Court any special power not contained in the Rule. *Syracuse Broadcasting Corp.* v. *Newhouse,* (C.A.N.Y., 1959) 271 F. 2d 910. Nor can a pre-trial conference take the place of a regular trial. *Berger* v. *Brannan,* (C.A. Colo., 1949), 172 F. 2d 241, certiorari denied 69 S. Ct. 1519, 337 N.S. 941, 93 L. Ed. 1746.

A similar order was held to be beyond the jurisdiction of the District Court in the case of *Padovani* v. *Bruchhausen* (1961), 293 F. 2d 546, from which we quote as follows:

> "First is the anomalous and even self-defeating character of the order itself. It does not in form deny the jury trial sought by the plaintiff, but it does so in substance. While it avoids the clear-cut issue sought by plaintiff in his alternative request for outright dismissal (as a basis for appeal) yet it leaves a trial necessarily abortive in nature. There must be better ways to vindicate pre-trial orders than by superfluous and hopeless trials which can be only burdensome to the litigants and the court.
>
> Second is the drastic nature of the penalty inflicted upon a litigant for what at most is an error or dereliction of his lawyer. It is to be noted that, although the defendant in its answer raised the defense of failure to state a claim for relief, that issue has not yet been considered and appears not ripe for decision; the decision which in practical effect ends the case is explicitly placed upon the lawyer's failure to comply with the court's requirements as to pre-trial. Further, there has been not so much outright default on counsel's part as a debatably inadequate compliance—an

issue in itself of some legal difficulty, as we shall presently indicate. It would seem hardly likely under these circumstances that the lay plaintiff could know or comprehend the doom about to be visited upon him, not his counsel, in time to avert it if, indeed, that were in any way possible.

Finally there is the form and content of the pre-trial procedure adopted here. And here we are constrained to conclude—with reluctance because of the extensive planning below, but with conviction of the need if pre-trial is to retain utility—that the course here followed not only is unauthorized, but is at odds with the purpose and intent of F.R. 16. That rule calls for a *conference* of counsel with the court to *prepare* for, not to avert, trial, leading to an order which shall recite the 'agreements made by the parties as to any of the matters considered.' It is subordinate and conciliatory, rather than compulsive in character. Nothing in the rule affords basis for clubbing the parties into admissions they do not willingly make; but it is a way of advancing the trial ultimately to be had by setting forth the points on which the parties are agreed after a conference directed by a trained judge.

[2] Here, however, the procedure was a kind of pre-pre-trial pleading—and special pleading at that—before hearing or conference was ever reached. So the successive orders and repleadings correspond to the motions and orders for a more definite statement of old pleading days, with more than a little of the futility therein so usual. Here over a year was consumed without ever getting to the conference stage; and the result unfortunately has been only delay and confusion, with a considerable commitment of the court to the side of the defense. Not without careful planning were the federal rules designed to eliminate the evils of special pleading, and they should not be brought back under the guise of pre-trial. See

the perceptive article: James, The Revival of Bills of Particulars under the Federal Rules, 71 Harv. L. Rev. 1473 (1958). The result is likely to be even more waste motion, with, almost inevitably, some sacrifice of the court's natural position of strict neutrality among litigants.

[3] This is shown *vividly* by the *nature* of the *disclosures* sought by the defendant and *approved* by the *court*. They were of two kinds: a demand for further particularity in the statement of the claim and a demand for the witnesses and exhibits to be offered by the plaintiff. So on the first point, defendant's original demand, which the judge incorporated in his order, was that the plaintiff state (1) 'the facts of this case,' identifying those admitted by the parties and those put in issue by the pleadings; (2) 'plaintiff's legal theory or theories of recovery'; (3) what facts plaintiff intends to prove in support of each theory; and (4) the details of plaintiff's damage. On the second, the plaintiff was required (5) to list all proposed exhibits; (6) the names and addresses of all expert witnesses, together with their field of specialization and the substance of their testimony; (7) the names and addresses of all lay witnesses and the substance of their testimony; and (8) whether he intended to seek further relief or discovery, and if so, what. And the demand for the pleading of a legal theory became ever more insistent as the proceedings continued, *so that at the end the defendant was seeking information as to detailed claims of law enumerated in several typewritten pages*. Yet if there is any characteristic of the federal rules (and indeed of code pleading generally) which is well settled, it is that a plaintiff pleads facts and not law and that the law is to be applied by the court. See, e.g., *Gins* v. *Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974, 976, and F.R. 54(c). In fact plaintiff did go beyond this to set forth in some

detail his theories of negligence and of breach of implied and express warranty. What more was or could be expected of him remains unclear. In any event, the departure here made from the pleading ideals embodied in the Federal Rules of Civil Procedure in the preclusion order against certain legal claims, based on failure to plead specially, is obvious and marked."

III.

APPROVAL OF THE TRUSTEE'S SUPPLEMENTAL FINAL REPORT WITH THE DIRECTION THAT THE TRUSTEE'S "ALLOCATIONS" BE PAID CONSTITUTES AN ABUSE OF DISCRETION AND SUCH A DEVIATION FROM THE BANKRUPTCY ACT AS TO NECESSITATE REVERSAL.

The Trustee's Final Report; Petition for the Determination of Amounts Due on Special Assessment Bonds and Coupons Constituting "Secured Claims" as Against Funds in this Matter and For An Order Directing Payment Thereof; Petition for the Determination of Costs of Administration, Including Fees for Trustee and Fees for Attorney for Trustee, and Woodmar's objections to the same are reprinted at pages 202-248, incl., in the Transcript of Record in Cause No. 11783. The order striking the Woodmar Realty Company's objections was reversed by the Court of Appeals on February 28, 1957 in the first appeal; 241 F. 2d 768. The Trustee's Final Report was amended in minor particulars on May 9, 1958, and on May 19, 1958, the Woodmar Realty Company filed its Motion to Strike and Dismiss on the ground that it failed to state sufficient facts to warrant payment of 300 liens and it constituted an abuse of process. Woodmar's objections to the Trustee's Supplemental Final Report appear at pages 437-499, incl., of the Appendix in this appeal, Cause Nos. 15694 & 15695. The order appealed from de-

nied the trustee's Motion to Strike Out the Woodmar Realty Company's Objections, denied the objections, and granted the relief prayed for by ordering payment of the listed bonds and coupons (Appendix in Cause Nos. 15694 & 15695, pp. 9 through 12, incl.).

A.

The Payment of Three Hundred (300) Lien Claims On Petition of the Trustee Without Evidence Or Proof Constitutes A Denial of the Woodmar Realty Company's Property Without Due Process Of Law.

Under the Fifth Amendment to the Constitution of the United States, the Woodmar Realty Company cannot be deprived of its assets without due process. In the case of *Burton* v. *Platter* (1893), 53 Fed. 901, 903, the Court held:

> "Chancellor Kent says: 'The better and larger definition of "due process of law" is that it means law in its regular administration through courts of justice.' 2 Kent, Comm. 13. *Certain it is that, in judicial proceedings, due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.*" (Our emphasis)

Thus, due process guarantees parties to a controversy a right to be heard and to *dispose* of their controversy by appropriate legal proceedings. *Washington-Southern Nav. Co.* v. *Baltimore & Philadelphia Steamboat Co.* (1924), 263 U.S. 629, 68 L.Ed. 480, 44 S. Ct. 220; *In re: Water Right* (D.C. Id. 1929), 30 F. 2d 436; *Traux* v. *Corrigan* (1921), 257 U.S. 312, 66 L.Ed. 254, 42 S. Ct. 124; *Postal Tele. Co.* v. *Newport* (1918), 247 U.S. 464, 62 L.Ed. 1215, 38 S. Ct. 566.

B.

The Law of the Case As Determined In The First Two (2) Appeals Precluded the District Court From Adopting a New and Different Procedure Depriving the Woodmar Realty Company of Its Right To Be Heard As An Adversary.

In considering the effect of pronouncements in previous appeals of the same cause, this Honorable Court has continuously maintained:

> "It has been settled by the decision of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second." *Roberts* v. *Cooper* (U.S. Mich., 1857), 61 U.S. 467, 20 How. 467, 15 L.Ed. 969. See also:
>
> *Board* v. *Kennicott* (U.S. Ill., 1876), 94 U.S. 498, 24 L.Ed. 260
>
> *Sizer* v. *Many* (1853), 57 U.S. 98, 16 How. 98, 14 L.Ed. 861
>
> *Himely* v. *Rose* (1809), 9 U.S. 313, 5 Cranch 313, 2 L.Ed. 111

Other Courts have, in numerous decisions, held that questions decided in a previous appeal constitute the law of the case and bind *not only* the District Court but the Appellate Court as well. As stated in *Standard Sewing Mch. Co.* v. *Leslie* (C.C.A. 7, 1902), 118 F. 557, 559:

> "To solve the questions presented by the remaining assignments, it is necessary to understand the former decisions in this cause; for it is a familiar and entirely righteous rule that a court of review is precluded from agitating the questions that were made, considered, and decided on previous reviews.

The former decision furnishes 'the law of the case' not only to the tribunal to which the cause is remanded, but to the appellate tribunal itself on a subsequent writ or appeal. *Roberts* v. *Cooper*, 20 How. 467, 481, 15 L.Ed. 969: 'There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on its opinions, or speculate of chances from changes in its members.'"

See also:

People v. *Illinois Cent. R. Co.*, (C.C.A. 7, 1899), 91 F. 955;

Cable v. *U.S. Life Ins. Co.* (C.C.A. 7, 1903), 111 F. 19;

Brown v. *Thom* (C.C.A. 8, 1921), 272 F. 950.

C.

The Rules Of Civil Procedure Required The Dismissal of Thirty-Two (32) Abandoned Lien Claims, Not The Payment Of Them.

The Record conclusively establishes that 32 lien claims involved dead persons, dissolved and non-existent corporations, and alleged persons who had no bonds or coupons or other interest in the proceedings. (See printed Appendix in Cause No. 13555.)

Woodmar's appeal from the order denying 32 separate Motions to Strike and Dismiss was dismissed because the order, being interlocutory in nature, was not final. *In the Matter of the Woodmar Realty Company* (1962), 307 F. 2d 505. Not only was no evidence introduced to support any "allocation" in favor of the 32 abandoned lien claims, as per example: Claim No. 233 (1121), David T. Emery; Claim No. 216 (1126), North-

western Investment Corp.; and Claim No. 232 (1121), Vera M. Dunn, but the Rules of Civil Procedure and the primary obligation of the Trustee required that they be stricken.

D.

With Regard To The One Hundred Two (102) Lien Claims, Settled and Approved Both Below And On Appeal, There Were No Proceedings Below, No Evidence Offered, No Motion for Summary Judgment, and No "Statements" to Justify "Allocations" In Their Favor.

The 102 approved and settled claims are listed in the printed Appendix in Cause No. 13023, pp. 51-53, incl. The Trustee did not move for "summary judgment" in their favor. The Woodmar Realty Company was not ordered, on November 28, 1962, to file statements in connection with these 102 lien claims.

Under the law of the case, the burden of proof was on the lien claimants. No proof was offered in support of the proposed "allocations" on October 22, 1962, (or at any other stage in the proceeding).

The Trustee's Supplemental Final Report simply ignored any requirement of proof for the proposed "allocations."

Notwithstanding the law of the case in 441, affirmed on appeal, precluding the allowance of interest beyond July 13, 1941, the Trustee's Report allocates interest up to December 1, 1954, almost 13 years at 6%!

IV.

THE ALLOWANCE OF TRUSTEE'S ATTORNEYS FEES IN THE AMOUNT OF $120,000 AND EXPENSES IN THE AMOUNT OF $3,390.96 AND TRUSTEE'S FEES IN THE AMOUNT OF $5,205.75 AND EXPENSES OF $729.96 CONSTITUTES AN ABUSE OF DISCRETION.

The gross assets of the estate totalled approximately $734,000.00. Fees and expenses allowed and paid prior to February 10, 1966, amounted to $216,993.58. (Record in Cause No. 11783, p. 175). The present allowance totals approximately $129,400.00. The fees and expenses, totalling almost 50% of the gross assets, make this estate unprecedented not only as to the length of time involved but in extravagance. Neither lien claimant, creditor, nor Woodmar have received any benefits from the proceedings. The Gary National Bank enjoyed a handsome profit until 1963.

The allowance order must be reversed and is contrary to law for each of the following reasons:

(1) No evidence was received or permitted at the hearing of October 22, 1965.

(2) It appears on the face of the opinion of January 19, 1966 (Appellants' Appendix in Cause Nos. 15694 & 15695), that the allowance is based upon bias and prejudice against the Woodmar Realty Company and its counsel rather than upon services performed in benefit of the estate as required by the Bankruptcy Act before an allowance can be made.

(3) The District Court has failed to find that the fiduciaries' services resulted in any benefit to the trust estate. The petition of respondent Davis reveals that his services consist, in the main, of hours spent in volunteer work,

not benefiting the estate. This includes representing the District Judge in mandamus actions, intervening in appeals (without court authority below), work done in connection with Claim No. 441 where he did not participate in the trial and was specifically directed to remain out of the case, and in preventing the 102 lien claimants from obtaining the benefits of the settlements.

(4) Services, volunteered, in forcing 2 appeals, No. 11783 and 13023, in which respondents were both unsuccessful.

(5) Making a claim, palpably extravagant and false, and totalling an alleged 796½—seven hour days. Eliminating Saturdays and Sundays, respondent Davis asserts that he worked a total of slightly over 3 full years computed at 5 days per week for 52 weeks per year. This is a practical impossibility.

(6) All of his alleged services have been performed, not protecting the cash assets of the estate against lien claims, but in attempting to prevent any adversary hearings on the lien claims and in preventing anyone from finding out who the lien claimants, in fact, are. These services are not compensable under the Bankruptcy Act.

The amount of the allowance on its face was violative of the statutory standard and was an abuse of the Court's discretion. *Dickinson Industrial Site, Inc.* v. *Cowan, et al.*, 309 U.S. 382, 389, 60 S.Ct. 595, 84 L.Ed. 819; *Newton, et al.* v. *Consolidated Gas Co., et al.*, 259 U.S. 101, 105, 42 S.Ct. 438, 66 L.Ed. 844; *In re*: *Solar Mfg. Corp.*, 3 Cir., 206 F. 2d 780, 781; *Coskery* v. *Roberts & Mander Corp.*, 200 F. 2d 150, 154.

Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils. Some of the many other cases to the same effect are: *Callaghan, et al.* v. *Reconstruction Finance Corp.*, 297 U.S. 464, 468-469, 56 S.Ct. 519, 80 L.Ed. 804; *Wolf, et al.* v. *Weinstein, et al.*, 372 U.S. 633, 639, 89 S.Ct. 969, 10 L.Ed. 2d 33. Obviously, under Sec. 241, the Supreme Court admonition as to referees is equally applicable to their attorneys. *Finn, et al.* v. *Childs Co.*, 2 Cir., 181 F. 2d 431, 435, and cases cited therein.

Claimants have the burden of proving their worth. Furthermore, "reasonable compensation for services rendered" necessarily implies loyal and disinterested service in the interest of those whom the claimant purports to act. *American United Mutual Life* v. *City of Avon Park, Fla.* (1940), 311 U.S. 138, 85 L.Ed. 91, 61 Sup. Ct. 157, 136 A.L.R. 860. Here, the claimants failed to sustain their burden.

Compensation is made only for such services as are of general benefit to the estate, and not for particularized services to such groups. *Watters* v. *Hamilton Gas Company* (1939), D.C., S.D. W.Va., 29 Fed. Supp. 436.

The statutes do not contemplate that the burden of paying for all personal services should be transferred from individual clients to the Debtor. *Teasdale* v. *Sefton Fibre Can Co.* (1936), C.C.A. 8th, 85 F. 2d 379; *Strauss* v. *Baker Company* (1937), C.C.A. 5th, 87 F. 2d 401.

Compensation should be allowed out of the Debtor's estate only for substantial and meritorious services rendered in the advancement of the reorganization proceedings and for the benefit of the estate. *Silver* v. *Scullin Steel Co.* (1938), (2 cases), C.C.A. 8th, 98 F. 2d 503;

Arcturus Radio Tube Co. (1940), D.C., D.N.J., 35 Fed. Supp. 783; *Nine North Church Street, Inc.* (1937), C.C.A. 2nd, 89 F. 2d 13.

CONCLUSION.

It is glaringly apparent that the decree sought to be reviewed purports to authorize distribution of estate assets in a manner not authorized by the Bankruptcy Act, in violation of precedents requiring pleading and proof by the lien claimants, and, in part, through an unwarranted distortion of the Federal Rules of Civil Procedure, for the benefit of two fiduciaries who have deprived legitimate parties in interest of their rights for an unprecedented number of years. Neither in conscience nor in law can they be compensated for their services in this case.

Wherefore, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgment of the Court of Appeals may be reversed.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

Nos. 15694, 15695
SEPTEMBER TERM, 1966 APRIL SESSION, 1967

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation, *Debtor*,

• • • • •

CITY OF HAMMOND, INDIANA, a Municipal Corporation,

and

WOODMAR REALTY COMPANY, a Corporation, Debtor, *Appellants*,

vs.

WALTER A. MCLEAN, Trustee, et al., *Appellees*.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

JUNE 22, 1967

Before KNOCH, CASTLE and KILEY, *Circuit Judges*.

KILEY, *Circuit Judge*. These consolidated appeals by Woodmar Realty Company, No. 15694, and the City of Hammond, Indiana, No. 15695, challenge the district court's judgment overruling their objections to the Trustee's Supplemental Final Report and to the fee and ex-

pense allowances for the Trustee and his attorney in the Woodmar bankruptcy proceeding. We affirm.[1]

WOODMAR

Woodmar contends that the Trustee's motion for summary judgment resulting in the orders entered July 24, October 10 and December 31, 1963, and May 15, 1964, allowing claims against the bankrupt estate was unauthorized under FED. R. CIV. P. 56 and the precedents and should have been stricken.

Since we wish to aid in the termination of this long pending proceeding, we are not disposed to treat this contention as waived by Woodmar's failure to appeal from these final orders.[2]

The parties agreed in 1957 that a typical lien claim, No. 441, and Woodmar's objections be tried as a "test case" to establish the law for determination of the 313 claims pending. The case was tried, with the Trustee excluded from participation, and in July, 1961, the district court entered judgment overruling as meritless Woodmar's objections and allowing the claim. Subsequently Woodmar appealed, and this court affirmed on August

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(1) A motion was made in this court to dismiss Woodmar's appeal for lack of standing because (a) in 1964 this court decided it had lost its previous standing, In re Woodmar Realty Co., 306 F.2d 479 (7th Cir. 1962), cert. denied, 380 U.S. 952 (1965), and (b) Woodmar's 1965 purchase of three claims without court approval did not give it standing but rather gave it a claim against itself or extinguished the claim. We prefer not to dismiss the appeal because there is language in the opinion in the above case which may have misled the bankrupt into the anomalous position of asserting standing because of claims bought with money borrowed from one of its directors. Id. at 480.

(2) This bankruptcy proceeding is twenty-six years old. It commenced as a Chapter X reorganization proceedings in 1941 and became by order a straight bankruptcy proceeding in 1953. Since 1953 there has been a more or less continuous course of litigation, including eight appeals from the judgments of four district court judges, Judges Steckler, Swygert (now Circuit Judge), Parkinson (later Circuit Judge and now deceased), and Tehan.

In a final district court order of February 24, 1960, Woodmar's previously acquired authority to settle claims against the estate was revoked. On October 10, 1963, the district court decided Woodmar no longer had standing as a party "in these proceedings." No appeal was taken by Woodmar. On September 22, 1964, this court dismissed by order an appeal by Woodmar and held that "appellant is no longer a party in interest and lacks standing to appeal." In re Woodmar Realty Co., No. 14758, 7th Cir. April 23, 1964. This dismissal presumably motivated purchase of the claims by Woodmar in 1965 so as to regain standing to object to the Trustee's petition for approval of the Supplemental Final Report. For purposes of this opinion, we assume but do not decide that Woodmar has standing.

20, 1962. *In re Woodmar Realty Co.*, 307 F.2d 591 (7th Cir. 1962).

On November 29, 1962, the district court ordered Woodmar to file statements to disclose wherein the decision on claim 441 was not, as stated in the Trustee's motion, controlling as to all lien claims. The statement was filed by Woodmar with respect to 132 of the more than 300 claims. The court reviewed the statement in exhaustive opinions, and found that the decision on claim 441 was determinative of all the claims. Thereafter it entered the several orders allowing the claims.

We think that it would be unconscionable at this late stage of the proceedings to set aside the district court's orders, upon the ground that the Trustee's motion was unauthorized—a ground that could and should have been, but was not, presented here for decision in timely appeals.

Even if literally the Trustee falls outside Rule 56,[3] which we do not decide,[4] we hold that in view of the long history of this litigation, the stipulated test case for all claims and the failure of Woodmar to respond to the court's order to present facts requiring hearing, a proper administration of justice requires that the judgment before us be affirmed. We think the judgment appealed from is right and we are not disposed to say under the particular facts here that it must fall because the Trustee was permitted at an earlier stage to make a motion for summary judgment.

We do not view the Trustee on this record as having taken a position inimical to the bankrupt estate or violative of his trust. We think his obligation was to do what he did, under the circumstances, *i.e.*, seek in summary

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(3) Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(4) But see In re Yellow Transit Freight Lines, Inc., 307 F.2d 602, 604 (7th Cir. 1953); Beall v. Pinckney, 132 F.2d 924 (5th Cir. 1943).

fashion to terminate the proceeding in a just and prudent way with the court's approval. *Cf. In re Woodmar,* 294 F.2d 785, 793 (7th Cir. 1961), *cert. denied,* 369 U.S. 803 (1962). We presume that a bankrupt, in whose shoes the Trustee stands, *In re Woodmar,* 294 F.2d at 793, would under all the circumstances here deem it his obligation to see that lien creditors with valid claims lawfully received as soon as practicable what was due them from assets fairly available.

We consider to be wholly meritless Woodmar's argument that the district court's order of November 29, 1962, requiring filing of statements by Woodmar as to the Trustee's motion for summary judgment, was an abuse of discretion under FED. R. CIV. P. 16. In view of the previous trial testing claim 441, we think the order was clearly justified under Rule 16 in the circumstances of this case.[5]

We turn now to the judgment before us entered by the district court on February 10, 1966, pursuant to a hearing upon the Trustee's Supplemental Final Report and petitions for fees by the Trustee and his attorney. The judgment "denied" objections of Woodmar and the City of Hammond (holder of claims Nos. 261, 507, 450 and 235), to the Report and petitions, and so far as pertinent on this appeal, ordered payment of all claims with limitations as to some; allowed the Trustee fees of $5,205.75 and expenses of $729.96; allowed Trustee's attorney fees of $120,000 and expenses and reimbursals of $3,300.96; and approved the Supplemental Final Report.

We think the law settled in the trial of claim 441 answers Woodmar's argument that the first two appeals to this court[6] precluded the district court from ordering payment of the claims without giving Woodmar the opportunity to be heard as an adversary. Woodmar, after that trial, had no "right" to contest each claim it objected

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(5) Rule 16. Pre-Trial Procedure; Formulating Issues
In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
(1) The simplification of the issues;
* * *
(6) Such other matters as may aid in the disposition of the action.

(6) In re Woodmar Realty Co., 241 F.2d 768 (7th Cir. 1957), and 284 F.2d 815 (7th Cir. 1960).

to, unless it produced facts or issues not then known or presented or decided in that trial. And the district court decided in final unappealed orders on the basis of the claim 441 decision that no new facts or issues were presented in opposition to the Trustee's motion for allowance of the claims. The failure of Woodmar to respond sufficiently to the court's November 29, 1962, order by raising genuine material issues of fact precludes it from now claiming violation of due process rights in denial of a hearing on each claim objected to.

No question can now be raised by Woodmar with respect to the validity of the qualified payments ordered in the judgment to "32 lien claims involving dead persons," etc. These claims were allowed by the district court under the Trustee's motion for summary judgment. Woodmar did not appeal from the order of allowance. There was no need to require proof again of those claims. Similarly, there was no reason to retry the 102 claims which Woodmar had compromised in 1957 and 1958. The compromises were set aside by the district court on April 28, 1964, upon petitions of certain lien creditors seeking relief from the compromises. The court then ordered allowance of the claims in the amounts found due by the Trustee. This court dismissed Woodmar's appeal from an order denying a motion to strike those claims on the ground that the order was non-appealable. 307 F.2d 595 (7th Cir. 1962).

Finally, Woodmar challenges the fees and expense allowances as an abuse of discretion. It contends no evidence was received or permitted at the hearing, that the district court's opinion underlying the allowances was based on bias and prejudice against Woodmar and its counsel, that the court did not find any benefit to the estate from the services rendered, and that the allowances violated federal standards. There is no merit in any of these contentions.

For more than twelve years' service (or 1,530½ hours) in this proceeding, the court allowed the Trustee the fee of $5,207.75, the maximum permitted under 11 U.S.C. § 76(a) and the predecessor of 11 U.S.C. § 76(c)(1) (1964).(*) Averaged out, the allowance is about $3.50 per

(*) The services commenced before 1956.

hour for work done and to be done in winding up the estate. We find no basis for Woodmar's claim of bias and prejudice.

There was no need for taking evidence at the hearing. Woodmar filed eleven pages of objections to the Trustee's report. The court found that except for three paragraphs the objections "are almost an exact copy" of parts of objections made to the Trustee's Report in April, 1958, and subsequently decided against Woodmar, and that these three paragraphs ignored the decision in 1958 upon test claim 441 which effectually overruled the objections in the paragraphs. We find meritless the contention that the Trustee's services did not benefit the estate. The record and district court's opinion fully refute the contention.

The court found that the allowance of $120,000 to the Trustee's attorney "constitutes reasonable compensation for work done and to be done" in winding up the estate. Woodmar offers no persuasive reason why Trustee's counsel, who has served since early 1953 and spent a total of 567½ days (or 1605¾ hours) involving much litigation in the district court, this court and the Supreme Court, should not have received the allowance the court granted. We see no reason for disagreement with the findings of the court and we find no abuse of discretion in the allowances made to the Trustee and his attorney.

CITY OF HAMMOND

What we have said in discussing the contentions of Woodmar settles the contention of Hammond, owner of three claims allowed in the amount of $5,968.28, that the Trustee was obliged to object to all of the lien claims. The test case of claim 441 in 1958 and the 1963 summary judgment proceedings rejected the same contentions that Hammond now advances that the liens upon which the claims are based had lapsed under Indiana law and that certain "bar dates" set in the original Chapter X proceedings in 1941 barred approximately 90 of the claims allowed. These contentions have no merit. *In re Woodmar Realty Co.*, 307 F.2d 592, 594 (7th Cir. 1962).

Hammond complains that no specific findings of fact underlying lien allowances were made under Rule 52(a). Specific findings were unnecessary, since the orders pursuant to the motion for summary judgment allowing the claims found that no genuine material issues of fact were presented. *A R Inc.* v. *Electro-Voice, Inc.*, 311 F.2d 508, 513 (7th Cir. 1962). We see no reason to consider the challenge now made as to inclusion of "illegal interest" in allocations to claimant. The time for this challenge was upon the allowance of orders in the summary judgment proceedings. All other Hammond contentions, such as those with respect to the Luscher and "dead" and "nonexistent" lien claimants, the effect of state foreclosure decrees on the liens and the "misappropriation" of trust assets are no longer viable.

We have in resolving Woodmar's contentions with respect to the fee and expense allowances of the Trustee and his attorney answered all arguments against the allowances presented by Hammond.

The Supplemental Final Report recommended: payment of 272 lien claims set forth on Exhibit A to the final report, claims in which the bonds and coupons were filed with the claim; the payment "only upon presentation of the bonds and coupons" of 43 lien claims set forth on Exhibit B to the final report, claims filed by "alleged" owners who had not filed bonds or coupons; and the allocation of $43,677.97 to unpaid lien indebtedness of the estate for which no claims had been filed, shown on Exhibit C.

The district court judgment ordered "payment . . . now" on claims listed in Exhibits A and B, subject to proper deductions for administrative expenses, upon presentation of bonds or coupons or "other satisfactory proof of ownership." The Trustee was ordered to pay the amounts allocated to claims listed in B into the clerk's office for disposition in accordance with section 66 of the Bankruptcy Act, 11 U.S.C. § 106 (1964), and 28 U.S.C. §§ 2041-42 (1964), and these amounts are to remain there until ownership is established in the manner provided. Payment "now" was ordered on claims listed on Exhibit C with

the same provision in respect to payment to and disposition by the clerk as given for those on Exhibit B.

We are not persuaded by Hammond that the order with respect to Exhibit C claimants is in error because section 66 of the Act does not apply since it presupposes claims that are provable and not "unproved liens." Hammond offers no legal or equitable alternative to the statutory scheme applied by the court.

The Trustee's motion to dismiss Woodmar's appeal, taken with the case, is denied. The judgment is affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division
* * (Caption — No. 3151) * *

(Filed February 10, 1966)

ORDER.

Hearings having been had in this matter on October 22, 1965, on the Trustee's Supplemental Final Report, and on all objections filed thereto, and on the petitions for the determination of and the allowance of fees and expenses filed by the trustee, Walter A. McLean, and by Herschel B. Davis, as attorney for the trustee, and on all objections filed to such petitions, and the court having filed its written opinion on January 19, 1966, as to the matters before the court at such hearing, now, therefore, for the reasons set forth in the court's Opinion and in accordance therewith,

It Is Ordered:

1.

That the objections filed by the City of Hammond, Indiana, claimants in Claims Nos. 261, 507, 450 and 235 to the Trustee's Supplemental Final Report, are now denied.

2.

That the objections to the Trustee's Supplemental Final Report filed by Betty Bassett and Grace Ellerman, claimants in Claim No. 531, are now denied.

3.

The Trustee's motion to strike out the objections filed by Woodmar Realty Company to the Trustee's Supplemental Final Report, is now denied.

4.

That the objections filed by Woodmar Realty Company to the Trustee's Supplemental Final Report are now denied.

5.

The Motion filed by the bankrupt, Woodmar Realty Company, on May 19, 1958, to strike out and/or to dismiss Trustee's Amended Final Report, is now stricken from the files.

6.

The claim filed with the trustee by the auditing firm of MacDiarmid, McCall & Co., for the balance of its auditing fees in the sum of $1,671.00, is now by the court approved and ordered paid.

The payment by the trustee to John Kettas, CPA, in the sum of $200.00 for auditing fees, is now approved.

7.

The objections filed by the City of Hammond, Indiana, to the petition of Walter A. McLean, as Trustee, for the determination and allowance of fees and expenses are now denied.

8.

The objections filed by the City of Hammond, Indiana to the petition of Herschel B. Davis, Attorney for the trustee, for the determination and allowance of fees and expenses are now denied.

9.

The objections filed by Woodmar Realty Company to the petition of Walter A. McLean, as Trustee, for the determination and allowance of fees and expenses, are now denied.

10.

The objections filed by Woodmar Realty Company to the petition of Herschel B. Davis, as Trustee's attor-

ney, for the determination and allowance of fees and expenses are now denied.

11.

The following claims listed in Exhibit A attached to the Trustee's Supplemental Final Report and described in detail in such Report, filed on unpaid special assessment bonds and coupons constituting secured claims in this proceedings which claims are each supported by an affidavit alleging that the bonds and securities described in such claims were owned by the claimant but that such bonds and coupons had become lost or mislaid, are now allowed by the court in the following amounts:

Claim 284	Deere & Co.	$ 29.76
Claim 139	Ellen Hutt Scheedle, Beatrice H. Bleiweiss and Margaret Hutt	387.90
Claim 63	Lee Martin, Ruth Martin Moore and Esther Martin, as Guardian of Ross Martin, Jr.	822.33
Claim 171	Mrs. L. M. Casper	470.75

12.

The following new claims, listed in Exhibit A attached to the Trustee's Supplemental Final Report and described in detail in such Report, filed on special assessment bonds and coupons constituting lien obligations of the bankrupt, Woodmar Realty Company, are now allowed by the court as follows:

Claim 544	Emma Wassman	$207.65
Claim 545	Mary A. Magginis and Veda Woodward	300.67
Claim 546	Helen G. Shanklin, Executrix of the Estate of Robert C. Shanklin	253.48
Claim 547	Edward L. Baker	512.91
Claim 548	Henry J. Sehuh	336.51
Claim 549	Frieda Harbeck	814.33

13.

The special assessment bonds and coupons listed and described in Exhibits A, B and C, attached to and made a part of the Trustee's Supplemental Final Report, are now adjudged to be unpaid lien obligations in this bankruptcy proceeding and such bonds and coupons are entitled to payment in the amount of the cash allocation recommended in such Exhibits less a proportionate deduction for the payment of the costs of administration herein.

14.

Payment shall be made on all of the special assessment lien indebtedness in this matter as follows:

a) Payment is now ordered to the claimants listed in Exhibit A in the amounts for which such claims have been allowed, all as listed and described in Exhibit A, subject however, to a proportionate deduction for the payment of the costs of administration in this proceeding.

No payment shall be made, however, on any claim unless the bonds and coupons which are the basis of the claim are produced and filed with the court or unless other satisfactory proof of ownership is furnished in accordance with the provisions of the Bankruptcy Act.

b) Payment is now ordered and directed on all of the bonds and coupons listed and described in Exhibit B in the amount of cash allocated to each bond and coupon in Exhibit B, subject, however, to a proportionate deduction for the payment of all costs of administration.

It is further provided that no payment shall be made to any claimant or on any bond or coupon unless the bonds and coupons which are the basis of the claim are produced and filed with the court or unless other satisfactory proof of ownership is furnished in accordance with the provisions of the Bankruptcy Act.

Until ownership of such bonds and coupons listed in Exhibit B is established and until such bonds are produced, or until satisfactory proof is furnished as to the ownership of such bonds and coupons, in accordance with the provisions of the Bankruptcy Act, the Trustee shall pay the amounts allocated to such special assessment bonds and coupons, less a proportionate deduction for administrative expenses, into the Clerk's office of this court for disposition in accordance with the provisions of Section 66 of the Bankruptcy Act and in compliance with Sections 2041 and 2042, Title 28, U. S. Code.

c) Payment is now ordered and directed on all of the bonds and coupons listed and described in Exhibit C in the amount of cash allocated to each bond and coupon in Exhibit C, subject, however, to a proportionate deduction for the payment of all costs of administration in this proceeding.

It is further provided, however, that no payment shall be made to any claimant or on any bond or coupon for the amount allocated to bonds and coupons in Exhibit C unless the bonds and coupons which are the basis of the claim are produced and filed with the court, or unless other satisfactory proof as to ownership is furnished in accordance with the provisions of the Bankruptcy Act.

Until the ownership of the bonds and coupons listed in Exhibit C is established and until such bonds are produced, or until other satisfactory proof is furnished as to the ownership of such bonds, in accordance with the provisions of the Bankruptcy Act, the amounts allocated to payment for such bonds and coupons, less a proportionate deduction for administration costs, shall be paid by the trustee into the Clerk's Office of the court for disposition in accordance with Section 66 of the Bankruptcy Act, and likewise in accordance with Sections 2041 and 2042, Title 28, U. S. Code.

15.

The claim of Walter A. McLean for an allowance for his services as trustee is now allowed in the sum of $5,205.75.

The claim of Walter A. McLean for expenses incurred by him as trustee is likewise allowed in the sum of $729.96.

Such sums are ordered paid as a cost of administration in this proceeding.

16.

The claim of Herschel B. Davis for an allowance for services as attorney for the trustee is now allowed in the sum of $120,000.00.

The claim of Herschel B. Davis for expenses incurred by him as attorney for the trustee is now allowed in the sum of $1,800.96, and the further claim of Herschel B. Davis to be reimbursed for the sum of $1,500.00 expended by him in defending himself against charges brought by the bankrupt is now likewise allowed in the sum of $1,500.00.

Such sums are ordered paid as a cost of administration in this proceeding.

17.

The Trustee's Supplemental Final Report is now in all things approved.

18.

The Trustee's Financial Report filed on October 22, 1965, is now approved.

Enter:

This 10th day of February, 1966.

/s/ Robert E. Tehan
Judge, U. S. District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division
(Caption — No. 3151)

(Filed January 19, 1966)

OPINION.

After twenty-five years of bitter controversy, these bankruptcy proceedings which commenced under Chapter X of the Bankruptcy Act have reached the stage where every lien claim against the bankruptcy estate and every objection to claims has been ruled upon. The great majority of lien claims recommended for allowance by the trustee have been allowed by separate order, each order setting forth the amount in which the claim is allowed. The orders allowing claims were entered in 1963 and 1964, and no appeals therefrom were taken either by the respective claimants, who might have expressed by appeal dissatisfaction with the amounts in which the claims were allowed, or by the bankrupt, which could have expressed by appeal dissatisfaction with the allowance of claims and the rulings on its objections.

In July of 1965, the trustee filed his supplemental final report herein, requesting authority to make certain distribution of funds and requesting a determination of costs of administration. Objections thereto were filed by the bankrupt and by the claimants in Claim No. 531.[1] The report and the objections, which the trustee moved to strike, came before the court at the final meeting of

[1] A letter objection from claimant George R. Williams was denied orally on October 22, 1965.

creditors held pursuant to notice on October 22, 1965. At that hearing, objections filed by the City of Hammond as claimant in Claim Nos. 261, 507, 450 and 239[3], after denial of its motion for a continuance, were also called for hearing.

Although the trustee's motions to strike objections are clearly meritorious, we prefer not to act on those motions, choosing rather to consider all objections on their merits in order that a complete record may be had.

Objections Of The City Of Hammond And The Claimants In Claim No. 531.

These objections, which are startlingly similar, were called for hearing pursuant to notice on October 22, 1965. No one appeared on behalf of the claimants in Claim No. 531, and counsel for the City of Hammond, when called upon to present his position, merely expressed satisfaction with the argument previously presented by counsel for the bankrupt and requested an opportunity to investigate and substantiate its position with respect to Paragraph 6 of its objection. In order that their respective positions might be before the court, counsel for those objectors were granted leave to file memoranda within ten days in support thereof. No memoranda have been filed as of this date. We might assume therefore that the claimants in Claim No. 531 have abandoned their objections and that the City of Hammond has recognized the invalidity of and abandoned its objection in Paragraph 6. Nevertheless, a discussion of the objections follows.

In Paragraph 1 of the objections, the objecting claimants state that no notice was given them and no copies of papers filed on July 6, 1965 were served on them or their counsel. Court records reveal that notice of the final meeting of creditors was mailed timely to counsel of record for the objecting claimants. Service of the

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[3] The City actually meant Claim No. 235, not 239.

supplemental final report, etc. on the claimants is not required since, under General Order 12, they must be furnished only with a summary thereof. The notice mailed to their attorneys pursuant to this court's order contained a proper summary.

Paragraph 2 of the objections states that the claimants are unable to admit or deny the allegations in the report and demand strict proof thereof. If the objecting claimants are unable to admit or deny the allegations of the trustee, their inability results primarily from a reluctance to engage in the work of checking the records in this case, since the allegations contained in the report are drawn from the record. Neither the court, the trustee and his counsel or other parties in interest can on the strength of this paragraph b put to the time, expense and inconvenience of a lengthy hearing by an unwarranted demand for strict proof of facts which the objecting claimants have not even put in issue.[1]

Paragraph 3 of the objections states that the trustee proposes an illegal method of distribution in violation of the objecting claimants' rights to prove their claims and trace their liens. All of the claims held by the objecting claimants have been allowed in specific amounts, with the exception of Claim No. 235 which was disallowed on December 31, 1963. Orders allowing Claims Nos. 261, 450 and 507 were entered on October 10, 1963. An order allowing Claim No. 531 was entered on May 15, 1964. If the objecting claimants had any quarrel with the amounts allocated to their claims, they should have appealed from those orders and cannot be heard now, long after the time for appeal has expired, to complain that their rights to prove claims and trace liens are violated. Paragraph 3 can only be considered an attempt by the claimants to

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[1] If the objectors, after investigation, doubted an allegation, they should have denied it.

obtain a greater allowance on their claims.[4] However the amounts to which they are entitled have been finally determined.

Paragraph 4 of the objections protests diminution (of what, is not stated but we assume claimants mean diminution of the amount allocated to their claims) through payment of administrative expenses and allocation of funds to bonds and coupons which constituted a lien on real estate of the bankrupt sold herein but the ownership of which has not been established.[5] Insofar as the claimants protest such allocation, they are again attempting to recover larger amounts on their own claims, the amounts of which have been finally determined. They have alleged nothing to indicate why they, unlike all other claimants herein, should escape all expenses of this long administration.

In Paragraph 5, the objecting claimants state that lien claimants are required to appear in open court and prove their ownership[6] and rights to assets. We do not know why these claimants demand to prove what has already been established by order of this court thus needlessly and senselessly seeking to prolong this twenty-five year old litigation. The lack of necessity for a hearing has been adequately discussed in this court's opinion of September 23, 1963. (See in particular Page 10 of that opinion)

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[4] We are certain that the claimants are not seeking an opportunity to prove claims and trace liens in amounts less than those already awarded them by the court.

[5] Exhibits B and C to the supplemental final report propose such an allocation. The objecting claimants do not deny that the bonds and coupons referred to therein affected the bankrupt's realty or are unpaid.

[6] The objecting claimants have demonstrated possession of the bonds and coupons on which allowances were made which, as we stated in Claim No. 441, proves ownership.

The City of Hammond, in Paragraph 6 of its objections, which paragraph is not contained in the objections of the other claimants, expresses fear that the trustee's allocation will subject it to suits and create problems. At the hearing of October 22, 1965, the City was unable to explain how the payment by the trustee out of funds never held by the City would in any way subject it to litigation, and as stated previously failed to file a memorandum in support of its position though afforded an opportunity to do so. Absent any argument, specification or even indication of disadvantage, we fail to see how disbursement of funds out of this court with a proper record kept can prejudice the City in any fashion.

The objections of the City of Hammond and of the claimants in Claim No. 531 to the trustee's supplemental final report are without merit. Insofar as they purport to be objections to the original final report they are likewise without merit.

Objections Of The Bankrupt.

As stated previously, we will consider the bankrupt's objections to the trustee's supplemental final report, some eleven pages in length, on their merits, without regard to the problem of whether the bankrupt, either as the bankrupt or as the recent purchaser of several small lien claims, has standing to object. In stating that we will consider the objections on their merits, however, we merely mean that we will not refuse to consider them, nor will we strike them, because of the lack of standing on the part of the bankrupt to object.

The objections, which the bankrupt filed on October 8, 1965, are, with the exceptions of Paragraphs 7, 8 and 9 thereof, an almost exact copy of portions of its amended objections dated April 29, 1958, to the trustee's final report. In merely reiterating its objections and in the content of the additional Paragraphs 7, 8 and 9, the bankrupt completely ignores the fact that since 1958 a test claim, Claim No. 441, was decided, that every lien claim

was examined in the light of the test case, that separate orders allowing most of those claims have been entered, that the amount which each claimant is entitled to receive has been established by orders entered herein in 1963 and 1964, that all of the bankrupt's objections to claims have been fully considered and held to be without merit, including objections as to amount and objections raising bar dates, statutes of limitations, etc., that it has been ruled that the trustee was under no duty to raise specious objections to claims, and that the lien liability against the bankrupt estate has been finally established.(7) The bankrupt has also either intentionally distorted or simply failed to understand the manner in which the lien claimants will be paid.(8) It further indefatigably argues that

(7) The bankrupt has stated in Paragraph 9 of its objections that orders allowing claims were "*only pro rata* and not final." The orders established definitely the amount recoverable in each claim and were final orders from which the bankrupt or claimants could have appealed and from which no appeals were taken. Provisions in the orders reserving to claimants a right to claim additional funds should additional funds become available did not affect the finality of the orders. Even if they had, the finality was unquestionably established when the source of additional funds was closed, that is, when settlement agreements were set aside by order of this court dated April 28, 1964.

(8) The bankrupt persistently insinuates that claimants will be paid without producing bonds or coupons or satisfactorily establishing ownership thereof. The trustee and the court have never so indicated. Any order directing payment will, of course, provide that the claimant must produce his bonds and coupons before payment be made and that copies thereof must be furnished for the claim file should originals be removed under order of court, unless the court directs otherwise. In producing the bonds and coupons, each claimant will establish possession and, as we stated previously, possession of these bearer bonds has been held to prove ownership. If the possessor is not the owner, it is the true owner, not the bankrupt who can complain.

claimants must prove their claims, implying that this presupposes a full scale court hearing on each claim, forgetting that the filing of a proper proof of claim itself constitutes proof, absent valid objection, and that the bankrupt has had the opportunity and failed to raise valid objections. We suggest that counsel for the bankrupt read our opinions and that of the Court of Appeals regarding Claim No. 441, and our opinions of May 20, 1963, September 23, 1963 and April 28, 1964, dealing with the remaining lien claims, which opinions are incorporated herein by reference. Those opinions and the entire record herein establish conclusively the lack of merit of the bankrupt's objections. The raising of such objections at this stage of the proceedings can only be considered as harassment of the trustee and parties in interest and as an insult and affront to the court. To dignify the objections by a lengthy discussion of what has been exhaustively treated previously would be unseemly.

In May of 1958, long before the supplemental final report was filed, the bankrupt moved to strike and/or dismiss the trustee's amended final report. Counsel for the trustee has moved to strike out that motion on the ground that the bankrupt is not a party in interest. Since we are here treating the bankrupt's arguments and pleadings as if it were a party in interest, we will not strike its motion on that ground. It must, however, be stricken because it has not been directed to the supplemental final report and because it sets forth matters which are wholly antiquated or without merit in the light of the decisions of this court and the Court of Appeals since 1958.

Trustee's Final Report.

The supplemental final report which came on for hearing pursuant to notice on October 22, 1965 brings up to date the final report filed originally in 1955 and the amended final report filed in 1958. It reflects the fact that since those reports were filed the claims recommended for allowance by the trustee have been allowed, the bank-

rupt's objections thereto have been considered and held to be without merit, and the bankrupt has been held to be not a party in interest. It further recites certain changes in ownership of bonds and coupons constituting a lien against assets of the bankrupt, and changes in allocations.

Because no meritorious or valid objection has been raised to the supplemental final report, as our prior discussion herein reveals, the court could properly state without discussion that it has reviewed that report and the record herein and determined that the report must be approved. However, due to the complicated nature of these proceedings, the length of time they have been pending and the possibility of distortion of fact due to the very immensity of the record, some limited discussion would appear to be in order.(9)

The trustee recites and the record reveals that when these proceedings commenced the bankrupt was the owner of considerable real estate which was encumbered by special assessment liens arising under Indiana's Barrett law. The real estate was sold or transferred in these proceedings free and clear of such liens which were transferred to the proceeds of the sales.(10) The duty then devolved upon the trustee to investigate to determine what liens existed and to determine what funds were available to satisfy them.

Claims were filed by the holders of most, but not all, of the Barrett law bearer bonds and coupons which affected property of the bankrupt. In its opinions respecting those claims, particularly its opinion of September 23, 1963, this court laboriously considered each assessment

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(9) We see no need to discuss the minute details of the report, such as treatment of newly filed claims or claims on which bonds and coupons have recently been produced, since no proper challenge thereto has been made.

(10) Some complication here arises because some of the property was transferred to satisfy another indebtedness.

roll under which claims were made and the bankrupt's contentions with respect thereto and determined that certain rolls constituted valid liens against property of the bankrupt.

In the supplemental final report, the trustee has recommended that the bonds and coupons listed in Exhibits A, B and C,[11] forming a part of his report, be adjudged unpaid lien liabilities of the bankruptcy estate, entitled to priority. Such an adjudication has in effect already been made as to Exhibits A and B, and since no claim of payment has been raised as to bonds and coupons listed in Exhibit C and since the rolls involved in Exhibit C have all been held to have affected the property of the bankrupt when these proceedings commenced, the bonds and coupons listed therein can be and now are held to be unpaid lien liabilities of the bankruptcy estate.

Payment can be and now is ordered to claimants listed in Exhibit A, who have satisfactorily established their

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[11] Exhibit A lists all claims on which bonds and coupons or other satisfactory proof of ownership have been produced. These claims have all been allowed in specific amounts. Exhibit B lists all claims on bonds and coupons on which payments are due but which have not been produced. These claims have all been allowed in specific amounts, but payment thereof will be withheld until the bonds and coupons are produced or the court is otherwise furnished with satisfactory proof of ownership. Exhibit C lists outstanding bonds and coupons in rolls which we have held to constitute liens against the bankruptcy estate, upon which bonds and coupons no claim has been filed. This record lien liability must, of course, be recognized by the trustee although no claims are filed, since lien claimants are under no obligation to file claims and the trustee must honor all valid claims. (While the bankrupt has asserted that these rolls are no longer liens, an assertion which the court has held to be erroneous, it has never claimed that Woodmar has satisfied its lien liability.)

ownership of the bonds and coupons on which their claims have been allowed, in the amount in which such claims have been allowed, subject to a proportionate charge for costs of administration. A like order can be entered as to claims in Exhibit B when bonds and coupons are produced or other satisfactory proof of ownership furnished. When proper proof of ownership is filed as to bonds and coupons listed in Exhibit C, payment will be ordered in the amounts allocated to those bonds and coupons in the trustee's report, subject to a proportionate charge for costs of administration.[12] Until ownership of bonds and coupons listed in Exhibits B and C is established, the trustee will pay the amounts allocated thereto as provided in §66 of the Bankruptcy Act and in accordance with §2041 and §2042, Title 28, U.S.C. subject to a proportionate deduction for costs of administration.

The accounting fees set forth in the supplemental final report at Page 38 are hereby approved and ordered to be paid.

The amount due the Referees' Salary and Expense Fund must be computed on the amount available for distribution to creditors. This will not be fixed with certainty until the time for appeal of our orders regarding costs of administration has expired or appellate procedures have been exhausted. We will compute the amount due the Referees' Salary and Expense Fund at that time.

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[12] In our opinions with respect to Claim No. 441 and in our opinion of September 23, 1963, we discussed at length the amounts in which claims were allowed. We need not therefore repeat here a discussion of amounts allocated to claims to dispose of the bankrupt's contentions regarding amounts. While ownership of bonds and coupons involved in Exhibits B and C is not established, it has been established that those bonds and coupons are unpaid lien liabilities of the estate. The bankrupt, even if it were a party in interest, would have no standing to question ownership.

Petitions Of Trustee And Trustee's Attorney For Fees And Expenses.

On February 16, 1953, an order was entered in these proceedings, which had commenced in 1941 under Chapter X of the Bankruptcy Act, adjudging the debtor, Woodmar, bankrupt and directing that bankruptcy be proceeded with. Walter A. McLean, who had been appointed trustee in the Chapter X proceedings in December of 1952, and Herschel B. Davis, who had been appointed attorney for the trustee in May of 1950, thereafter became trustee and trustee's attorney respectively in the straight bankruptcy and have acted in those capacities to the present time. Their petitions for fees and expenses cover the straight bankruptcy period of these proceedings.

As their petitions and the record herein reveal, neither the trustee nor his attorney has been provided with a sinecure. The questions with which they had to cope concerning lien rights against the estate and apportionment of funds were highly complex. And the complexities confronting them were intensified by the activities of the bankrupt which (1) insisted on repeatedly raising specious objections to claims, (2) irresponsibly charged the trustee and his attorney with fraud, (3) resisted any attempt to honor valid lien claims even after it should have recognized that its objections to such claims lacked any merit, and, (4) in its campaign of obstructionism filed eight appeals and nine petitions for mandamus with the Court of Appeals and three petitions for rehearing and two petitions for certiorari following decisions of that court.[12]

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[12] A party normally is not criticized for vigorous prosecution of his case. In this case, however, counsel for the bankrupt has refused to acknowledge the existence of hundreds of rulings against his position. He has also blithely ignored the adverse decisions of the Court of Appeals.

In the performance of their duties, the trustee and his attorney investigated lien claims against this estate and determined that most of those claims were valid and should be allowed and the extent of the lien rights against the estate, determinations which this court has held to be correct. These determinations were made by 1955. Since that time the bankrupt, and the bankrupt alone, has impeded the closing of this estate and the only persons with sufficient interest to withstand its attack were the trustees and his attorney.[14]

At the hearing of October 22, 1965, the City of Hammond filed objections to the fee petitions of the trustee and his attorney. Its counsel stated that he was unprepared to proceed and the court granted him ten days within which to present his specifications of objection and argument in writing. Nothing has been filed as of this date. Absent any showing to the contrary, we hold those objections to be without merit. As was the case with its objections to the final report the City, in merely denying possession of information with which to plead, cannot require "strict proof."

The bankrupt, of course, has also objected to the petitions of the trustee and his attorney for fees and expenses,[15] but has challenged no specific item in the verified itemizations of time spent and expenses incurred attached to such petitions.

With respect to both petitions the bankrupt charges, as he has continuously charged, that the trustee and his counsel, in recommending payment of lien claims and

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[14] Their interest, of course, arose out of their duty as arms of the court. The bankrupt's interest was in regaining approximately a half million dollars. No lien claimant had sufficient interest, financially or otherwise, to wage war on that large a scale.

[15] The trustee's motion to strike those objections will be denied.

resisting the bankrupt's attempts to secure the disallowance thereof, have violated their duty to defend the estate. It is and has been the bankrupt's position that the trustee's duty to preserve the estate requires him to resist even those claims against the estate which he believes to be valid and is, in effect, a duty to represent, or attempt to preserve the assets for, the bankrupt. This position is absurd. The trustee has a duty to preserve the assets for those entitled to them, and to defend the estate against invalid claims, and his failure to raise non-meritorious objections to valid claims in no way violates that duty. In fact, had the trustee raised himself the objections to claims raised by the bankrupt, he would rightfully have been subject to criticism for wasting assets of the estate in worthless litigation.

The trustee and his attorney are also charged by the bankrupt in its objections with failure to perform services benefitting the estate and with delaying its closing. As stated previously, it is the bankrupt which impeded the closing of this estate and the actions of the trustee and his attorney in resisting the bankrupt's efforts to prevent payment of valid claims were indeed beneficial.

The bankrupt further asserts that the trustee's attorney should be denied fees because he took legal positions contrary to those taken by the bankrupt regarding validity of claims, settlements, etc. The bankrupt ignores completely the fact that in all major respects the positions taken by the trustee's attorney since his appointment in 1953 have been approved by this court.

Because of the complicated nature of these proceedings and of the Barrett law claims involved herein, the time and work necessarily involved in determining the extent of lien rights against the estate, and the difficulties caused the trustee by reason of the actions of the bankrupt which necessitated not only substantial litigation to assure that persons entitled to funds out of the estate receive those funds but also defense against personal attacks upon

himself, the trustee is entitled to receive the maximum fees permitted under the statutes, plus his expenses as shown in his petition. Since these proceedings commenced prior to 1956, the statutory maximum is $5205.75. His petition for compensation in excess of that maximum must be denied, there being no authority for granting such additional compensation.

In his petition, the trustee's attorney seeks an admittedly substantial allowance for fees. We know of no case, however, in which a substantial allowance is so well justified. The legal questions confronting him under the Barrett law concerning allocations of funds to lien claimants herein were fraught with difficulties at best.[16] Add to these the problems caused by the bankrupt, including eight appeals, three petitions for rehearing, two petitions for certiorari to the Supreme Court, charges of fraud, resistance of valid claims, etc., and it is apparent that the trustee's attorney was faced with and acquitted himself of a task of horrendous proportions. It is typical that the bankrupt, whose activities precipitated much if not most of the labor of the trustee's attorney, now objects that his petition is excessive and that his efforts were not beneficial. However, this court, with its knowledge of these proceedings, can unequivocally state that it was primarily through the work of the trustee's attorney, performed under unbelievably arduous and unpleasant conditions, that entitlement to assets in this estate was determined. Absent his efforts it is not inconceivable that the bankrupt would have succeeded in harassing and wearying lien claimants to the extent that it would acquire by default assets to which it had no right.

---

[16] Counsel for the bankrupt himself, as our opinions with respect to Claim No. 441 and our opinion of September 23, 1963 reveal, was unable to understand or compute the extent of lien rights of claimants under the Barrett law.

Considering the time already spent and to be spent by the trustee's attorney as set forth in his petition, the nature and difficulty of the services performed and the obstructionism encountered, the result of his efforts, and the minimum fee schedules, it is our opinion that the $120,000 sought constitutes reasonable compensation for work done and to be done in this matter. We further hold that the trustee's attorney is entitled to the reimbursement sought for expenses, excepting $6000.00 for stenographic hire, and is entitled to reimbursement of amounts paid out for legal services in defending himself against the bankrupt's charges of fraud.

With respect to the bankrupt's objections to the fee petitions, like its objections to the supplemental final report, we note that the bankrupt considered itself entitled to a full scale evidentiary hearing. The fee petitions were in the proper form required by [illegible]62 of the Bankruptcy Act, and specified in detail the services performed and expenses incurred. General objections relating to the benefit to the estate and extent of performance of duties do not raise evidentiary issues. Those paragraphs of the objections stating the bankrupt's version of the history of these proceedings are not relevant to the matters before the court and are merely an attempt to obscure the real questions now before the court while ignoring the present status of these proceedings.

Counsel for the trustee will prepare orders pursuant to this opinion for submission to the court.

Dated, this 19th day of January, 1966.

/s/ Robert E. Tehan
U. S. District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No. 784

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,
Debtor,

* * * * *

~~CITY OF HAMMOND, INDIANA, a Municipal Corporation,~~ and WOODMAR REALTY COMPANY, an Indiana Corporation,
Petitioners,

vs.

WALTER A. McLEAN, TRUSTEE,
Respondent.

} In Proceedings for the Reorganization of a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WOODMAR REALTY COMPANY, PETITIONER.

RESPONDENT'S BRIEF IN OPPOSITION.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WOODMAR REALTY COMPANY, PETITIONER.

RESPONDENT'S BRIEF IN OPPOSITION.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

In July 1965, Walter A. McLean, Trustee in bankruptcy for Woodmar Realty Company, a corporation, filed in the

United States District Court, for the Northern District of Indiana, Hammond Division, a Trustee's Supplemental Final Report, alleging in substance that all pending claims in this bankruptcy matter had been acted upon by the court and that the time for appeal from such action had long since passed,—and then praying for authority to make distribution on the claims as allowed in the amounts set out in such report.

At the same time the Trustee and Trustee's counsel filed petitions for the allowance of fees and expenses.

Hearing was had on such report and petitions in the District Court on October 22, 1965. At that time the bankrupt, Woodmar Realty Company and the City of Hammond, a lien claimant, both filed objections to the Trustee's Supplemental Final Report and to each of the fee petitions. On January 19, 1966, the District Court Judge, Robert E. Tehan, of Milwaukee, Wisconsin, on special assignment in the District Court for the Northern District of Indiana, handed down an opinion denying the objections of Woodmar Realty Company and the City of Hammond and in such opinion ordered the approval of the Trustee's Supplemental Final Report and the making of distribution to the creditors as prayed for in the Report. In such opinion the District Court likewise determined the amount of the allowance of fees and expenses for the trustee and trustee's counsel. The opinion of January 19, 1966 is attached as "Appendix C" at page 15-a to the petition now before this court.

Thereafter, on February 10, 1966, the District Court entered a judgment in conformity to such opinion and such judgment is set out as Appendix "B" at page 9-a to 14-a in the Appendix filed with this petition.

Thereafter, both Woodmar Realty Company and the City of Hammond appealed to the Court of Appeals—7th Circuit—and the Court of Appeals affirmed, on June 22, 1967, the opinion of the District Court. The opinion of the Court of Appeals is set out as Appendix "A" at page 1-a to 8-a in the Appendix attached to this petition.

The respondent believes that in order that there be a proper understanding of the matter now before this court, —that this court should know that the Woodmar bankruptcy matter has been pending in the District Court for the Northern District of Indiana, since January 1941; that since 1955 the matter has been in constant litigation; that Woodmar Realty Company has, since 1955, prosecuted nine appeals from the orders of the District Court to the Court of Appeals; that eight of such appeals have been taken from the rulings of the present presiding Judge, Robert E. Tehan, on special assignment to the Northern District of Indiana; that the last six appeals have been heard and passed upon in the Circuit Court of Appeals by the same panel of judges, to-wit: Circuit Court Judge Knoch, Circuit Court Judge Castle and Circuit Court Judge Kiley, and that in all of the six appeals, the Court of Appeals has affirmed the judgments of the District Court.

It should also be pointed out that on two prior occasions, —first in 1961, and again in 1965—Woodmar Realty Company sought relief in this court by filing petitions for writs of certiorari. Both of such petitions were denied.

If the writ of certiorari is denied to the petitioners at this time, the trustee will then be enabled to proceed with distribution so that this bankruptcy matter, pending for more than 26 years in the District Court, can be in all things completed.

OPINIONS BELOW.

The Court of Appeals on June 22, 1967, affirmed the order of the District Court. A copy of the Court of Appeals opinion is set out at pages 1-a to 8-a, Appendix "A" attached to the petition.

The District Court order appealed from to the Court of Appeals is set out at Appendix "B" at page 9-a of the Appendix, and the District Court's opinion approving the Trustee's Supplemental Final Report and ordering distribution is set out in Appendix "C" at page 15-a of the Appendix.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed in this matter is dated June 22, 1967. On September 20, 1967, on the 90th day allowed for the filing of a petition for certiorari—the City of Hammond filed a petition for an extension of time for the filing of such a petition. The petition for extension was granted.

Woodmar Realty Company did not file a petition for an extension of time and did not file a petition for certiorari within 90 days from the date of the judgment sought to be reviewed.

The jurisdiction of this court to rule on petitions for certiorari is found in 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

The petitioner contends that the following questions are presented for review:

(1) Whether or not the Court of Appeals erred in approving the District Court's use of the "motion for summary judgment" concept as a means and method of avoiding any hearings on lien claims against the Woodmar Realty Company's assets.

(2) Whether or not the Court of Appeals erred in approving the District Court's abuse of discretion under Rule 16 of the Federal Rules of Civil Procedure in ordering the Woodmar Realty Company to file "statements in connection with lien claims".

(3) Whether or not the Court of Appeals erred in approving a form of trustee's report which prays for "allocations" in favor of lien claimants without regard to lack of proof of either the existence of the lien claims or the amounts, if any, which they may have coming out of the assets.

(4) Whether or not the Court of Appeals erred in approving the allowance of trustee's fees and trustee's attorney's fees in amounts approximating $130,000.00.

CONSTITUTIONAL RULES, PROVISIONS, ETC. INVOLVED.

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> Rule 56. Summary Judgment.
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended December 27, 1946, effective March 19, 1948.
>
> (b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (28 USCA, Rule 56, page 302)

Rule 16 of the Federal Rules of Civil Procedure provides in pertinent part:

> Rule 16. Pre-Trial Procedure; Formulating Issues.
>
> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

(28 USCA, Rule 16, page 591)

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which

constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended December 27, 1946, effective March 19, 1948.

(28 USCA, Rule 52(a), p. 14)

CONCISE STATEMENT OF THE CASE.

In January 1941, an involuntary petition was filed under Chapter 10 of the Bankruptcy Act in the United States District Court for the Northern District of Indiana against Woodmar Realty Company. The record shows that this corporation, at the time of the filing of the petition, had been a dormant and inactive corporation for more than ten years. It was organized for the subdividing and sale of vacant lots and its only asset was 1540 vacant lots and 12 unsubdivided blocks of residential property in Hammond, Indiana. This real estate was encumbered by substantial general property taxes, a delinquent first mortgage of in excess of $300,000.00—and special improvement liens under some 50 special improvement resolutions issued under the authority of the City of Hammond. Under the Indiana Barrett Law—all of such special improvement resolutions provided for the issuance and sale of special improvement bonds, which bonds were payable over a period of ten years. In January 1941, all of such special improvement liens were unpaid and delinquent (the principal sum of the unpaid improvements was approximately $477,000.00), and 49 different special improvement rolls were in foreclosure in the county courts of Lake County, Indiana.

The real estate taxes and the mortgage indebtedness were compromised and settled in 1941, leaving as the only remaining indebtedness the unpaid special assessment litigation under the 50 rolls heretofore described.

The Woodmar Realty Company filed an answer in the Chapter 10 proceedings in the District Court admitting

its insolvency and consenting to the adjudication. Due to the shortage of building materials during World War II, no residential building was possible in the next few years and the corporate reorganization proceedings moved forward at a slow pace. In the years from 1946 to 1951 it became apparent that corporate reorganization was not the answer and that liquidation of the corporation was advisable. In these years,—proceeding under orders of the District Court—the trustee sold all of the different parcels of real estate—"free and clear of encumbrances" with the funds received from such sales being then impressed with the lien of the special improvement liens then existing on the different parcels of the property sold.

In May 1951 all of the vacant land had been sold by the trustee. In February 1953, after lengthy hearings in the District Court, it was decided that corporate reorganization was not feasible and Woodmar Realty Company was then placed in a straight bankruptcy, in accordance with the provisions of Section 236(2) of the Bankruptcy Act.

The special improvement bonds issued under the 50 improvement resolutions had been widely sold. In the years in corporate reorganization, more than 250 claims had been filed by bondholders in the proceedings, and after 1953 many additional claims were filed on these improvement bonds in the straight bankruptcy action.

In the years from 1953 to 1955 the District Court on the trustee's petition authorized the employment of a certified public accountant for an auditing study so that the amounts received on the sale of the bankrupt's real estate could be applied properly to the payment of the lien indebtedness on the property sold as represented by

the different special assessment bonds and coupons—shown as unpaid on the books and records of the City of Hammond.

As a result of the findings of this auditing study and the trustee's examination and work on all of the lien claims—the trustee, in September 1955 filed a report in the District Court alleging that he had studied and examined all of the pending lien claims, and then in such report the trustee recommended to the court the allowance of 313 lien claims filed by the holders of unpaid special assessment improvement bonds. In such report, the trustee further alleged that through the auditing study—the total unpaid special assessment bond liability had been determined on each roll and that likewise, the amount of the cash allocation due to each special assessment bond and coupon had been determined and in such report the trustee recommended an allocation of cash to each unpaid bond and coupon in the amount established by the auditing study.

Thereafter, in 1958, the trustee filed an amended final report again alleging and recommending an allocation of cash to each unpaid special improvement bond and coupon in an amount as fixed by the auditing study and recommended the allowance and payment of some 313 claims—all as previously alleged in his report filed in September 1955.

After the filing of the trustee's report in September 1955, the bankrupt appeared in the bankruptcy proceedings through its counsel and filed objections to virtually all of the lien claims. The trustee moved to strike out such objections on the theory that the bankrupt—being insolvent—was not a party in interest. The District Court

sustained the trustee's motion, but this action was reversed in the court of appeals. The court of appeals held that inasmuch as the disallowance of all the claims would result in there being no indebtedness against the bankrupt held that Woodmar Realty Company was a party in interest to object to these special assessment liens. *In re: Woodmar Realty Company,* CCA 7th Cir. 1957, 241 F. 2d 768.

At the time of the reversal of this appeal (March 1957) there were 313 claims then pending in the District Court and Woodmar Realty Company had filed objections to virtually all of such claims. In its brief in the court of appeals, Woodmar Realty Company alleged that all of the claims on special improvement bonds and its objections thereto raised the same factual and legal problems.

In June 1957 a pretrial conference was held which was attended by Woodmar Realty Company and representative lien claimants. Woodmar Realty Company reported that the following steps were agreed to:

> "By agreement of all parties in interest, who attended the pretrial conference at Lafayette on June 28, 1957, Claim 441 was tried as a 'test' or 'pilot' claim for the purpose of establishing general rules of law by judicial decision applicable to the 313 claims listed in the Trustee's Amended Final Report."

The record shows that Woodmar Realty Company filed 15 objections to Claim 441. This "test" or "pilot" claim was tried by the court and the court found that the bankrupt's 15 objections to such claim were entirely without merit. The Woodmar Realty Company appealed this test case to the Court of Appeals and the District Court's order allowing Claim 441 and denying the bankrupt's

objections was affirmed. *In re*: *Woodmar Realty Company*, CCA 7th Cir. 1961, 307 F. 2d 591.

Immediately after the ruling on the test claim 441—the trustee filed a motion for summary judgment asking that the District Court determine (1) that Claim 441 was tried as a test case to determine the validity of the bankrupt's objections to all lien claims, (2) that on the basis of the court's judgment on Claim 441—that the objections to all lien claims were without merit, and (3) that there are no valid objections on file to any of the lien claims, and that (4) the bankrupt is not a party in interest.

The objections filed by the bankrupt to the lien claims raised two specific defenses; (1) that the claims on special assessment bonds and coupons were barred by the Indiana Statute of Limitations, (2) that such claims had been merged in judgments taken in foreclosure actions in the state courts, and then it was contended that there were other evidentiary matters involving the other claims which would make the court's decision on Claim 441 inoperative and ineffective as to the other claims.

The trustee contended in its motion for summary judgment that the facts already established in the record—in this long pending matter,—brought each claim within the ruling on Claim 441 and that there was in truth no genuine issue of material fact as to any of the other claims, and that the only question as to such claims was a question of law.

On November 29, 1962, the District Court, acting under Rule 16 Federal Rules of Civil Procedure—relating to pretrial procedure, in an effort to determine whether there existed with respect to the question of validity of the bankrupt's objections to the remaining lien claims—any genuine issue of material fact—entered an order re-

quiring that the bankrupt, Woodmar Realty Company, should file not later than January 11, 1963, a statement as to each pending claim, containing the following information:

A. If the objections filed are based upon the Statute of Limitations, then the bankrupt will set forth:

1 to 4. In substance as to how and in what manner the claim is barred by the Statute of Limitations, and how and in what manner the ruling on such claim should not be governed by the decision on Claim 441.

B. If objections have been filed by the bankrupt alleging that the claim was merged in a final judgment in a foreclosure action—then the bankrupt will set forth in substance as to how and in what manner such merger has taken place, and how and in what manner the allowance of the claim should be affected.

C. If the bankrupt contends that there are any other facts which differentiate any claim from Claim 441, then the bankrupt will state with specificity the manner in which such claim and the objections thereto—make it different from Claim 441 and require a different adjudication.

D. In its opinion of July 21, 1961, the court has described the proper method of computing the amount due on bonds—out of this estate. Using such method, the bankrupt will state as to each claim the amount it believes should be recovered by the claimant if the claim is held to be valid.

It is further ordered that if the bankrupt fails to furnish the information required in paragraphs A, B

and C as above directed, it will be deemed to have admitted,—with respect to each claim—where such failure occurs, that the claim is valid under the law as established on Claim 441 and that such claim can not be differentiated from that claim.

If it fails to furnish the information required in paragraph "D" above, as directed, as to any claim, it will be deemed to have admitted that the trustee has properly arrived at the amount of that claim in his amended final report.

The bankrupt then, in accordance with such order, filed responses to some 151 of the pending claims.

The District Court order of November 29, 1962, is set out in pages 488 to 490 in the Appellant's Appendix in Cause Nos. 15694 and 15695, United States Court of Appeals,—which Appendix is now a part of the record in this court.

After the filing of the responses by the bankrupt, the District Court judge examined each of the remaining 304 pending lien claims in the light of the responses as filed,—the objections on file to each claim, and then, in two voluminous and detailed orders of May 20, 1963 and September 23, 1963—held in effect as to these pending lien claims that the bankrupt's objections to such claims were governed by the court's decision and judgment on Claim 441; that the bankrupt's objections to such claims were without merit and that there was in fact no genuine issue of material fact and that such claims should be allowed in the amounts recommended for allowance by the trustee in the Trustee's Amended Final Report.

The District Court's order of May 20, 1963, is set out at pages 458-500 in the Appellant's Appendix in Cause Nos. 15694 and 15695, United States Court of Appeals, which Appendix is now a part of the record in this court on this matter.

The District Court's order of September 20, 1963, is set out at pages 500 to 556 in the Appellant's Appendix in Cause Nos. 15694 and 15695, United States Court of Appeals,—which Appendix is now a part of the record in this court.

In its order of September 23, 1963, in passing upon the lien claims and the validity of the bankrupt's objections thereto, said as follows:

> "The bankrupt, having failed to show that any Class II claim (lien claim) recommended for allowance by the trustee must be disallowed after having been given full opportunity to do so, is no longer a party in interest."

On the same day the District Court entered the following judgment:

> "It is Ordered that the bankrupt, Woodmar Realty Company, is not a party in interest within the meaning of Section 57(d) of the Bankruptcy Act and has no standing in this proceedings." Appellant's Appendix, Cause No. 15694, 15695, page 557.

In July 1965 the trustee filed his Supplemental Final Report and the trustee and trustee's counsel filed fee petitions for the allowances of fees and expenses. The trustee's report traced in great detail the history and the many steps taken in the administration of this bankruptcy over a period, since his appointment, of eleven years. Such report then alleged that all pending claims had been allowed by court order and that the time for

appeal from the allowance of such claims had long since passed.

The trustee likewise alleged that the amount of the allowance of each claim had been fixed and determined and that there was no pending claim or objections to a claim awaiting decision. The trustee in his report then prayed that the fee allowances of the trustee and trustee's counsel be fixed and determined—and that he then be authorized to make distribution to the claims as allowed, and that this bankruptcy administration then be closed.

Hearing was had on October 22, 1965. The bankrupt, Woodmar Realty Company, filed objections to the trustee's final report and the City of Hammond, a lien claimant, likewise filed objections to such report.

On January 19, 1966, the District Court handed down its opinion on such hearing and such opinion is now set out on page 15-a, as Appendix "C" on the petition filed in this matter by the City of Hammond.

The United States District Court thereafter in an order on February 10, 1966, based upon its opinion of January 19, 1966, denied the objections filed by Woodmar Realty Company and the objections filed by the City of Hammond, and approved the trustee's final report and fixed and determined the fees and expenses to be allowed to the trustee and trustee's counsel. A copy of such order is attached as Appendix "B" to the petition.

Thereafter, both Woodmar Realty Company and the City of Hammond appealed to the Court of Appeals and on June 22, 1967, the Court of Appeals affirmed the judgment of the District Court. The judgment of the Court of Appeals is attached as Appendix "A" to the petition.

ARGUMENT.

I.

The briefs filed by Woodmar Realty Company in its appeal to the Court of Appeals are now a part of the record in this court. The "Argument" part of the appellant's brief is found at pages 39 to 67 of that brief. At pages 22 to 45 incl., in the petition for certiorari—Woodmar Realty Company, under the heading of "Argument" sets forth its alleged argument for the granting of certiorari in this proceedings.

A careful study and examination of these pages of "Argument", and a comparison of the argument set out in Woodmar's briefs on appeal in the Court of Appeals—shows that the alleged "Argument" in the petition for review is an exact copy, word for word, of paragraphs II and V, incl., of the Argument in the brief on appeal.

For example, Paragraph I, at pages 22 to 32 in the Petition for Certiorari is exactly the same as Paragraph II at pages 45 to 55 in the brief on appeal.

That likewise, Paragraph II of "Argument" in the petition, at pages 32 to 37, is a copy verbatim of Paragraph III at pages 45 to 55 in the brief on appeal.

That likewise, Paragraph II of "Argument" in the petition, at pages 32 to 37, is a copy verbatim of Paragraph III at pages 55 to 60 of Argument set out in Woodmar's brief on appeal. The same thing is true of Paragraph III of the alleged "Argument" found on pages 37 to 42 in the petition. The petitioner, Woodmar Realty Company, has copied this section of its "Argument"

word for word, and citation for citation—as set out in Paragraph IV, pages 60 to 64, of appellant's brief.

In addition, Paragraph IV of the Argument in the petition for review, at pages 42 to 44, constitutes duplication of Paragraph V included in Woodmar's brief on appeal.

These four paragraphs, I to IV incl., constitute the complete "Argument" set out in the petition for certiorari filed by Woodmar Realty Company. In other words, this petition for review sets out no new argument citing its reasons for review by this court.

The Respondent believes that this duplication of argument, presenting now as reasons for review by certiorari —the same exact argument as advanced on appeal—is an argument for two different types of relief and is not a good faith presentation of a petition for review. Respondent believes—in keeping with Rules 19 and 23 of the Supreme Court—that such a presentation is not in keeping with the type of presentation of reasons for review required in such rules and that such duplication of argument should not be considered by this court.

II.

A.

In its petition for review and on its appeal to the Court of Appeals—Woodmar Realty Company contended that the trustee's motion for summary judgment was unauthorized under the rules—that it should have been stricken from the record on the bankrupt's motion and that it should not have been granted.

As alleged in the Concise Statement of Facts, some 304 lien claims were filed in this proceedings. The bankrupt objected to virtually all of such claims. The claims and objections thereto involved the same factual legal problems. By agreement of all parties—one claim, Claim 441—was tried by the court as a "test claim" to establish by legal decision basic rules of law applicable to all of the remaining 304 claims. Claim 441 was tried as a "test case". Finding was entered for the claimant and that all of the bankrupt's objections to such claim were held to be without merit. The District Court's decision on this "test claim" was then affirmed on appeal.

Thereafter, the trustee filed a motion for summary judgment seeking a determination that Claim 441 was tried as a "test case" and that the court's decision on such claim—that the bankrupt's objections to such "test claim" were without merit—in effect was a decision that the bankrupt's objections to all other lien claims were likewise invalid.

Shortly thereafter, the District Court, without ruling on the trustee's motion for summary judgment—and proceeding under Rule 16—the pretrial procedure—entered an order on November 29, 1962 requiring that the bankrupt set forth in substance how and in what manner (1) the defense of the Statute of Limitations barred recovery on the other lien claims, and (2) how and in what manner the bankrupt's objection of merger in judgment applied to the claims other than Claim 441, and (3) how and in what manner there were other factual situations applying to claims other than Claim 441 which differentiated such other claims from Claim 441, and made the court's decision on Claim 441 ineffective to determine the legal and factual decision on other claims.

Such order further provided that the bankrupt, using a formula established in the proceedings in Claim 441, should compute the amount to be due on each outstanding lien claim—if such claim was to be allowed.

This portion of the pretrial order further provided that if the bankrupt did not compute the amount to be allowed on each claim—then such failure on the part of the bankrupt would constitute an admission that the amount alleged by the trustee as being due on such claim in his amended report was correct.

The bankrupt then filed partial responses on some 151 pending claims. Thereafter, the District Court, in the light of the bankrupt's responses on all lien claims, and in the further light of the record on the "test claim 441" —studied and examined each of the 304 pending lien claims. Thereafter, in two detailed and voluminous orders, on May 20, 1963, and on September 23, 1963, the District Court reviewed its examination and study of all of the pending lien claims and then determined that there was no genuine issue of material fact as to any of the pending lien claims differentiating such claims from the "test claim 441", and then further determined that such lien claims should be allowed in the amount recommended for allowance in the trustee's amended final report.

The District Court order of May 20, 1963, is found in the Appendix, Cause 15694 and 15695, at pages 458-500, and such Appendix is now a part of the record in this court on this proceeding.

The District Court order of September 23, 1963, is found in the Appendix in Cause 15694 and 15695 at pages 500-557 in such Appendix, and that Appendix is now a part of the record in this court on this appeal.

The important point in this regard is that the District Court, after studying the complete record in the bankruptcy matter, together with the facts developed by the bankrupt's response on the pretrial order of November 29, 1962, and after having examined each of the pending lien claims and the objections thereto filed by the bankrupt—found that as to each pending claim there was no genuine issue of fact differentiating such claim from Claim 441, and that the bankrupt's objections to the other claims —based upon the holding in the "test" claim 441, were without merit.

On this basis and after this study and examination, the District Court ordered the allowance of the then pending lien claims by separate order. Such claims were then allowed in definite amounts and no appeal was ever taken from such orders of allowance. Likewise, on September 23, 1963, the District Court having ordered the allowance of all lien claims then found as a fact that Woodmar Realty Company was not a party in interest—and then, on September 23, 1963, entered an order that Woodmar Realty Company was not a party in interest and had no standing in such proceedings.

This order is found at page 557 in the Appendix in Cause 15694 and 15695, now a part of the record in this appeal.

No appeal was taken from the allowance of the separate lien claims or from the District Court's judgment that Woodmar was not a party in interest.

B.

In its appeal to the Court of Appeals and in its petition for certiorari filed herein—Woodmar Realty Com-

pany contends that the trustee, under Rule 56 of Civil Procedure was not a proper party for the filing of such a motion. In Moore's Federal Practice, 2nd Edition, Vol. 6, pages 2182-2184, this author discusses the use of summary judgment in proceedings in bankruptcy and says as follows:

> "In proceedings and controversies arising in controversies over which the bankruptcy court has jurisdiction, the federal rules are generally applicable by virtue of General Order 37. Unless inconsistent with the Act or General Orders, Rule 56, therefore, applies and the basic principles underlying the grant or denial of summary judgment govern."

Likewise, in the following bankruptcy cases reported in bankruptcy proceedings the trustee moved for and used the summary judgment proceedings in aiding in the administration of a bankruptcy matter.

Schwartz v. *Levine & Malin, etc.*, CCA 2d 1940, Ill. F. 2d 81;

Beall v. *Pinckney*, CCA 5th Cir. 1943; 132 F. 2d 924;

In re: Yellow Transit Freight Lines, CCA 7th Cir. 1953, 207 F. 2d 602;

In re: Norwalk Tire & Rubber Co., D.C. Conn. 1950, 93 F. Supp. 870.

In each of the above cases, the only test was whether or not there was a genuine issue of fact remaining to be decided, as was the situation in the Woodmar matter.

It is important to note that the Court of Appeals did not believe it necessary to rule on this point on account of two reasons: (1) the propriety of a summary judgment by the trustee had not been raised on appeal from orders ruling on such summary judgment procedure, and (2)

because of the District Court's painstaking procedure under Rule 16 and the detailed and complete examination made by the District Court as to each pending claim, and the further fact that the court, after such examination, made a determination that there was no genuine issue of material fact to be decided as to each claim.

III.

In Paragraph II of its Argument in the petition for review of the decision of the Court of Appeals—Woodmar Realty Company complains that the court's order of November 29, 1962, was an abuse of discretion under Rule 16 of the Federal Rules of Civil Procedure.

As previously pointed out, at the time such order was made there were pending in this bankruptcy administration some 304 claims based upon special improvement liens. One lien claim—Claim 441—by agreement of all parties, including Woodmar, had been selected to be tried as a "test" claim so that rules of law applicable to all of the remaining lien claims could be established by legal decision. Such claim was tried as a "test" claim and the bankrupt's objections were held by the court to be without merit.

The bankrupt had previously reported to the court that all of the lien claims were of the same type and involved the same legal and factual problems.

After the decision on Claim 441, the trustee filed a motion for summary judgment contending in effect that the court's decision on the "test" claim was decisive of all of the lien claims and that there were no different legal or factual problems existing as to such other lien

claims, and that on the basis of the court's opinion on the "test" claim, the bankrupt's objections to all other lien claims were without merit.

The Woodmar Realty Company refused to abide by its stipulation and contended that there were differences as to the other claims not raised as to Claim 441, and different legal problems, and maintained that each of the 304 lien claims had to be tried separately in the District Court.

The trustee, prior to this time, in accordance with the trustee's duty as established in the cases of, *In re: Prather*, D.C. So. Dist. of Ill. 1956, 138 F. Supp. 433, and *Grodsky v. Sipe*, Eastern Dist. of Ill. 1941, 36 F. Supp. 244, had filed in this bankruptcy complete records of the outstanding special lien indebtedness existing as against the bankrupt's property and had likewise filed an allocation of cash to each bond and coupon in an amended trustee's report.

All of this information was available to the bankrupt. On November 29, 1962, at a pretrial conference the District Court then made the pretrial order complained of. Woodmar Realty Company, although it now complains of this order in its petition for review, does not set out such order in its Appendix. Such order is found, however, at pages 488-489 in the Appellant's Appendix in Cause 15694 and 15695, Court of Appeals, which appendix is now a part of this record in this court.

The effect of such order was that the bankrupt who had been contending that there were different factual situations as to the other lien claims and other objections to such claims not governed by the decision on the test claim, 441, —was now required to show how and in what manner the

remaining lien claims and the objections thereto differed from Claim 441.

The order further required that the bankrupt, by way of response, compute the amount which it believed should be allowed on each bond and coupon, and then provided that if the bankrupt failed to compute the amount on each bond and coupon, then such failure would constitute an admission that the amount computed and set out as an allowance on such bonds and coupons in the trustee's amended report was correct.

The District Court clearly had the right under Rule 16 to make its order of November 29, 1962. Such order called upon the bankrupt to produce the facts—the evidence—on which it claimed that there were defenses different to those presented by way of objection on Claim 441.

A like situation was presented to the court in the case of *Berger* v. *Brannam*, CCA 10th Cir. 1949, 172 F. 2d 241, where the court said:

> "Since the only issue between the parties was what material data was recorded in the appellant's petitions,—and since the appellee had alleged that his "Exhibit A" correctly reflected all pertinent data, the court was not required to stand by, permit appellant to rest on its general denial and await the outcome of a long and expensive trial to see whether such a denial was sustained. Since the appellees conceded appellant's right to credit for all such items, but claimed that it had given such credit in the preparation of "Exhibit A",—the court had the power under Rule 16 to require appellant to point out specifically what items on its books—were omitted from appellee's "Exhibit A". Appellant, having failed to do so, there was no real issue of fact in dispute,—and plaintiff's exhibit—buttressed by the affidavit of the

> person who prepared it, stated that it correctly reflected all pertinent items shown by the appellant's books,—stood unchallenged and the court properly sustained his motion for summary judgment under Rule 56."

and the order of November 29, 1962 was similar to the pretrial order made in the *Berger* case, and was not an abuse of discretion by the District Court—but was an exercise of the power granted to the court under Rule 16.

IV.

In this petition for review of the decision of the Court of Appeals—the petitioner lists the third question for review as follows:

> Whether or not the Court of Appeals erred in approving a form of trustee's report which prays for "allocations" in favor of lien claimants without regard to lack of proof of either the existence of the lien claimants or the amounts, if any, which they may have coming out of the assets.

The Respondent, of course, knows that the truth or falsity of the above listed allegation is not going to be inquired into on a consideration of this petition for certiorari. However, if the complete record of this bankruptcy is in this court, then such record will show that a great sufficiency of evidence was introduced in the bankruptcy court as to the special improvement bond liability—existing bond for bond— as unpaid liens against the bankrupt's property. This evidence went into the detail of showing each bond and coupon that was unpaid. The bankrupt, in fact, in these proceedings introduced exhibits in evidence showing that 49 different special assessment lien rolls constituted liens on the bankrupt's property.

The evidence before the District Court judge likewise involved an auditing study made by a certified public accountant employed under orders of the District Court—and such auditing study made allocations of cash to each unpaid bond and coupon, such allocations being for the share due to each bond and coupon from the net proceeds of the sale of property on which the bond and coupon presented a lien.

That evidence was before the District Court when the District Court allowed,—by separate order—more than 300 lien claims in this matter.

Any representation that claims were allowed in this matter without evidence to sustain such allowances—or charges that allowances of cash were recommended to claims without proof—are untrue and ridiculous in the extreme.

V.

Woodmar Realty Company lists under Item 4 of the "Questions Presented for Review", the following:

> "Whether or not the Court of Appeals erred in approving the allowance of trustee's fees and trustee's attorney's fees in amounts approximating $130,000.00."

The record shows that the trustee's petition for the allowance of fees and expenses and the petition of trustee's counsel for fees and expenses were presented in the District Court at a creditor's meeting. The allowance of such petitions under the law were addressed to the sound discretion of the District Court judge. This judge's rulings on such petitions are in the record in the opinion of the District Court as set out in Appendix "C" at page 15-a and attached to this petition.

The discussion of fees and expenses is found particularly at pages 25-a to 29-a, inclusive. The Court of Appeals likewise approved the amount of such allowance.

The long pendency of this proceeding, the fact that the trustee and his attorney have carried this proceedings without any payment since 1953,—the further fact that there have been nine appeals from the District Court to the Court of Appeals,—several petitions for rehearing,—and now three petitions for certiorari to this court,—together with the substantial sums involved,—were all taken into consideration by the District Court judge in the making of such allowances.

As heretofore alleged, the matter of allowances is a matter addressed to the sound discretion of the trial court judge. In this instance, the allowances and the amount thereof do not constitute a proper reason for the consideration of a petition for a writ of certiorari.

VI.

The Decision of the Court of Appeals Is Clearly Correct.

As has been previously pointed out, this bankruptcy matter has been pending in the United States District Court for the Northern District of Indiana since January 1941.

The effect of the judgment of the Court of Appeals was to permit the winding up of this long pending matter.

The indebtedness as is set out herein is in the form of unpaid special improvement bonds—representing liens on the bankrupt's real estate. The closing of the bankruptcy will permit some payment on these bonds after 26 years of litigation.

As has been pointed out—since 1955 there have been nine appeals to the Court of Appeals from the District Court, all of them taken by the bankrupt.

There have been two prior petitions for certiorari by Woodmar Realty Company. This bankrupt has certainly had its day in court.

In the District Court opinion of January 19, 1967—the District Court characterized the conduct of Woodmar Realty Company, the bankrupt, in pressing its objections, as follows:

> "We suggest that counsel for the bankrupt read our opinions and that of the Court of Appeals regarding Claim 441—and our opinions of May 20, 1963—September 23, 1963, and April 28, 1963, dealing with the remaining lien claims, which opinions are incorporated herein by reference. Those opinions and the entire record herein establish conclusively the lack of merit in the bankrupt's objections. The raising of such objections at this stage of the proceedings can only be considered as harassment of the trustee and parties in interest and is an insult and affront to the court."

This portion of the District Court's opinion is found at Appendix "C", page 21-a attached to this petition.

CONCLUSION.

The petition for review wholly fails to show any cause whatsoever why the action of the Court of Appeals in this matter should be reviewed.

The questions presented in such appeal were simple problems arising in the administration of a bankruptcy estate.

No established precedent was violated by the decision of the Court of Appeals. It clearly appears that in this litigation there is no important legal question of federal law requiring decision by this court. No conflict is pointed out in the decision of the Court of Appeals in this matter—with cases decided in other courts of appeals or in the opinions of this court.

WHEREFORE, for the reasons heretofore set out, the Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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